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AN ANALYSIS OF THE POST-WORLD WAR II CONCEPT
OF WEST GERMAN FEDERALISM

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George C. Puhrmann III

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by

George C. Puhrmann III

Approved by Committee:

Francis M. Wilhoit
Chairman

C. Walter Clark, Jr.

Walter N. Breymann

Earl L. Canfield
Dean of the Graduate Division

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CHAPTER I

PURPOSE OF STUDY AND DEFINITION OF FEDERALISM

Federalism is a common political term which describes a number of governmental systems of the 20th Century. Federalism has been incorporated in varying forms into the governmental systems of the United States, Switzerland, the Federal Republic of Germany, Canada, Australia, India, Brazil, Austria, the Union of South Africa, the Union of Soviet Socialist Republics, Yugoslavia, Mexico, and Argentina.¹ It is, however, a far more complex principle than most persons realize, as will presently be demonstrated.

I. PURPOSE OF STUDY

The purpose of this study is to analyze one form and one instance of federalism, i.e., federalism as it was established and as it has developed in theory and practice in the Federal Republic of Germany from 1949 to 1963. The form of federalism found in this young nation has certain unique aspects, although it does fall within the broad limits of traditional federal principles. These unique aspects, their implementation in a modern nation, and their continuing evolution in the government of the Bundesrepublik are of continuing concern to contemporary political scientists.

¹Robert G. Neumann, European and Comparative Government (Third Edition; New York: McGraw-Hill Book Company, 1960), p. 679.

In the following chapters an attempt is made to present a depth-analysis of the scope and nature of West German federalism today. In order to do this adequately, the historical background of West Germany as well as the general nature of federalism must first be examined. To obtain the data relevant to these areas a number of scholarly sources were studied, beginning with the Basic Law of the Bundesrepublik.

II. FEDERALISM IN THEORY AND PRACTICE

Because of the variety of forms of modern federalism, the term is not easily defined. A brief comparative analysis of systems utilizing federal principles and a survey of some federal theories will here serve as a tool for arriving at a working definition.

Theories of federalism. Contrary to what one might think, federalism is not a purely modern political phenomenon. As a form of government, federalism can be traced back to the ancient past, since federalistic politics were not unknown to the citizens of the city-states of classical Greece. Federalism of a sort was also to be found in some of the cities of Medieval Italy. It has been developing since at least the thirteenth century in Switzerland.¹

¹C. F. Strong, Modern Political Constitutions (New York: G. P. Putnam's Sons, 1930), p. 98.

In the eighteenth century, the period when modern federalism first became popular as a political form, a federal form of government was viewed as "pertaining to or of the nature of that form of government in which two or more states constitute a political unity while remaining more or less independent with regard to their internal affairs."¹

At that time federalism was an expression of the age, i.e., an age in which political and economic problems were generally of a local nature. Since then federalism has evolved in other directions, due largely to such forces as industrialism, nationalism, and urbanism. Greater services are now demanded of the nation-state and overwhelming opposition to the consolidated central government has declined.²

In its broadest sense today, federalism envisions the federation as the ideal political and social institution. It is characterized by a tendency to substitute co-ordinating relationships for relationships of a subordinate nature; to replace command and compulsion from higher levels with reciprocity, persuasion, and law.³

¹Hans Sperber and Travis Trittshuh, American Political Terms (Detroit: Wayne State University Press; 1962), pp. 148-49.

²Neumann, op. cit., p. 690.

³Max Hildebert Boehm, "Federalism", Encyclopaedia of the Social Sciences (New York: The Macmillan Company, 1931), VI, 169-70.

By any definition, the term federalism is quite broad. Thus it is readily adaptable to implementation in varying forms in a variety of socio-political situations. Flexibility is, indeed, one of federalism's most valuable assets. Widely diversified peoples can be united in one federal nation because the flexibility of the federal system allows local control of local governmental functions within the framework of the larger national unit.¹

The political scientist Robert Neumann defines federalism as a "method through which power is divided between the central government and the authorities of regional units in a particular country." He further clarifies the concept of federalism by comparing it to its diametrical opposite, i.e., the highly centralized unitary form of government. For in the unitary system the central government makes virtually all of the important policy decisions which must then be carried out by the regional or central administrative units.

Neumann also points out that there are several variant forms of federalism, which he calls "quasi-federalism." In cases such as the governments of the U.S.S.R., Yugoslavia, Mexico, and Venezuela, federal theory is mixed with unitary practice to form quasi-federal forms.²

¹Felix Morely, Freedom and Federalism (Chicago: Henry Regnery Company, 1959), p. 2.

²Neumann, op. cit., p. 679.

As a socio-political phenomenon federalism may be divided into two main types: centrifugal and centripetal federalism. Centrifugal federalism, the form most common to continental Europe in the nineteenth and early twentieth centuries, is a reaction against unitarism. As a force of opposition to the Napoleonic type of unitarism, centrifugal or decentralized federalism has united with unpolitical forces; and in its extreme form may border on anarchy. On the other hand, centripetal federalism, as a conservative force, emphasizes and guarantees solidarity and union in a strong state. It seeks to weaken or even to destroy particularism and separatism. This type of federalism seems to be more popular in the present era.

As time has passed federalism has become a more common and an ever more complicated theory of government. The rise of fanatical nationalism throughout the world has been a primary cause in the growth of popularity for the federal form of government, because it allows diverse socio-political entities to be united in a stable nation-state. Federal theories have also been increasingly encouraged and adopted by international organizations, as only federal forms are feasible when the federated units involved retain almost complete sovereignty.¹

One should not, however, confuse the pure federal form with that

¹Boehm, op. cit., pp. 170-172.

of the loose confederation. The two types do have certain common characteristics, but the confederation is clearly distinguishable as a much more decentralized union. It can be regarded more specifically as a "comprehensive and cohesive form of international administrative union, whereas a federal system is regarded as a multiple government in a single state."¹ One could also consider the confederation to be merely a "close alliance." Basically this means that the "internal sovereignty" of each member state remains largely unimpaired while its "external sovereignty" is decreased only by a very small degree.² The most obvious point of distinction between the two forms, however, is that in a federal union, because of the delegation of some overriding authority to the central government, a national capital will necessarily be established.³

The federal form of government is also recognizable through several common political forms which are to be found in every true federal government. Thus, in a genuine federal system one finds, under various names and in varying forms, a common executive, a federally constituted legislative body (an upper house or chamber usually representing the federated units), and some form of judicial body which has the authority to decide

¹Arthur W. Macmahon, "Federation," Encyclopaedia of the Social Sciences (New York: The Macmillan Company, 1931), VI, 173.

²Strong, loc. cit.

³Morely, op. cit., p. 1.

jurisdictional disputes arising within the regional-central relationship.

The main factor making a system federal is the nature of the distribution of powers between the regional units and the central authority.¹ Clear determination of this requires a constitution, which is obviously the most basic need of a federal state. A federal constitution may be conceived of as a treaty or legal contract. It is an agreement between political units which delineates the powers that the federating units will retain and those that will be placed under the authority of the central government. The state in which the "reserve powers" are assigned to the federal authority will tend to be more unitary, however, than the state in which the federated units retain the "reserve powers." This division of powers implies that neither the federal authority nor the federated units will always be supreme for there is an ultimate authority above both of them--the federal constitution.

To ensure a lasting and just division of powers in a federal system two political institutions are essential. The first is a judicial body with the ultimate authority to decide jurisdictional disputes between the federated units and the federal authority. The second is a constitutional amending process which will require agreement among most or all of the regional authorities before the basic constitutional framework can be legally altered.

¹Neumann, *op. cit.*, p. 681.

In practice, the amount of power given to such a judicial body has varied, but in a completely federalized state this body is supreme in its power to resolve conflicts between the federal authority and the federated units. This in turn gives rise to the question concerning the process to be used in making changes in the federal constitution. The constitution is necessarily in written form due to the fine balance on which the division of powers between federal authority and federated units rests. In federal constitutions the ability to change the constitution, the amending process, should not be so easy that frequent tampering with the basic law will occur. Thus most federal constitutions are commonly thought of as "rigid", because they may be changed only according to strict conditions which are explicit or clearly implied.⁴

As previously stated the trend towards federalism has increased over the decades. Nationalism and industrialization have been pointed out as causative factors of this trend, but the importance of the federal form itself should not be overlooked. In countries where great diversity in geography, race, language, religion, or culture exists the federal system is the most readily adaptable form of government, for it allows both unity and diversity to exist together within a common union. In fact, one finds that federal forms of government have been adopted mainly because of unique political, social, and geographical conditions in specific areas, and not

⁴Strong, op. cit., pp. 61, 101-3.

because federalism was considered merely the most efficient form of government per se.¹ Thus socio-political and geographical factors can be considered the main cause for the popularity of federalism.²

To assure continued success and consistency in a political system which contains so many diverse elements a process of constant adaptation must be built in. This is a function of the previously mentioned federal judicial body. The federal judicial body through its opinions can give specific direction to adaptation of national-regional intergovernmental relationships to meet changing needs.³ This is a common federal phenomenon.

In sum, when considering federalism as a governmental form, one should keep in mind that the true federal state will have three basic characteristics. First, there will be constitutional supremacy or ultimate authority of the federal union resting in the document upon which it was founded. Second, an areal distribution of powers will exist between the regional units and the federal authority. Third, a supreme judicial authority will have the power to reconcile disputes which arise between the federated units and the federal authority.⁴ These three elements will also be helpful

¹Neumann, op. cit., pp. 681, 688-89.

²Boehm, op. cit., p. 170.

³Neumann, op. cit., p. 689.

⁴Strong, op. cit., p. 61.

in attempting to differentiate one federal system from another in the following pages.

In seeking to analyze federalism further it is useful to examine intimately actual governments which are based on federal principles. The most logical choice of federal systems to examine would include the governments of the United States and Switzerland, as they are considered to be the two classic examples of modern federalism. In historical context these two states were the first nation-states to adopt federal systems of government (the United States at the end of the eighteenth century and Switzerland in the mid-nineteenth century), although in Switzerland federalism had its roots as far back as the thirteenth century. Both countries have unique federal forms, and both are therefore important in considering variant forms of federalism. They have also served as models for most of the federal governmental systems which have been created after their establishment.

Federalism as practiced in the United States. As previously stated, the governmental system of the United States is one of the classic examples of federalism and one of the first systems to employ the modern concepts of federalism. The original constitution of the United States, which was drafted in 1787, is the oldest written federal constitution still in use today.¹

¹Herbert J. Spiro, Government by Constitution: The Political Systems of Democracy (New York: Random House, Inc., 1959), p. 143.

It has been said that federalism in coming to dwell in the governmental system of the United States was "historically ordained." This view is based on the fact that the thirteen original English colonies had been individually established and had developed widely varying socio-political practices by the time that they joined in revolt. The diverse political entities could only be combined in a general union if a great degree of diversity could be protected. So, for a variety of reasons, the government of the United States was created "not only as a federation of semi-sovereign States, but also as one of balanced authority, in which it would be extremely difficult to establish a nationwide monopoly power of any kind."¹ It was neither a unitary state, nor a loose "confederal" one--it was a sort of a half-way house.

To examine the federal system of government in the United States one must start when its constitution was being drafted. The Constitutional Convention that created the still functioning constitution met in the summer of 1787. The Convention was preceded by two events which influenced its delegates to a great extent: the War of Independence (1775-83) and the creation of a loose Confederation made up of the former thirteen colonies (1781-89). The Congress of the Confederation had actually called the Constitutional Convention. In creating a wholly new constitution the convention delegates drew upon institutions from other governments, but

¹Morely, op. cit., pp. 7-8.

they also made a number of important innovations, among which were most of the provisions concerning federalism.¹ The constitutional draft prepared by the Convention went into effect in 1789 and exists today with only twenty-four formal amendments added to the original document.²

The federal principle as embodied in the American Constitution might be summed up in this manner:

"We the people" have, in the Federal Constitution, made a division of the powers of government between the Federal government in Washington and the governments of the several states. The division of powers so prescribed was not devised by either the previously existing central government or the states acting alone, nor can it be amended or abrogated by the action of either type of governmental agency acting alone.³

The most prominent feature of the federalism created by the Constitutional Convention is the separation of powers, which was carried to a considerable degree. In addition to the areal separation of power between the states (federated units) and the federal authority, power has also been divided between the three branches of the federal authority (judiciary, executive, legislature). This sharp separation of powers was purposely included by the constitutional framers to prevent any monopoly of power in any one area. In other words, a "checks and balances" system was included within the broader federal framework.⁴

¹Spiro, op. cit., pp. 143-46.

²Strong, op. cit., p. 103.

³W. Brooke Graves, American State Government (Boston: D.C. Heath and Company, 1953), p. 15.

⁴Morely, op. cit., pp. 4-5.

Turning to the more traditional aspects of federalism, one finds in Article X of the American Constitution that power is specifically divided between the federal authority and the several states. In Article X pure federalism is clearly evident, as any powers not delegated to the federal authority or prohibited to the states are therein reserved to the states. The federal authority is limited to the actions which it can constitutionally pursue, as are the states.¹ The principal residual power of the states is commonly referred to as their "police power." Under this power the state assumes the right to control and care for the "health, morals, safety, and welfare of its people."² Other areas of action are expressly precluded from state authority. These areas include the conclusion of alliances, maintaining a standing army, and those fields in which state action would interfere with the effectiveness of the national government.

Article IV of the American Constitution is sometimes known as the "Federal Article" because it includes interstate obligations. By this article, the states are obligated to do certain things, and the national government is obligated to guarantee every state a republican form of government.³ It specifically obligates the several states to co-operate with

¹Graves, op. cit., p. 16.

²John H. Ferguson and Dean E. McHenry, The American System of Government (New York: McGray-Hill Book Company, 1959), p. 75.

³Wilfred E. Binkley and Malcom C. Moos, A Grammar of American Politics: The National Government (New York: Alfred A. Knopf, 1949), pp. 87-88, 94.

each other by extending one another "Full Faith and Credit", granting extradition and assuring to everyone the "privileges and immunities" of United States Citizenship.¹

Of almost equal importance to the separation of powers are the mutual ties which bind the states and the federal authority together in a federal union. The American Constitution guarantees the several states that the federal authority will maintain for them: a republican form of government; equal representation in the upper legislative house; internal tranquility and defense from invasion or dismemberment; and equality before the courts. Each state in turn assumes certain responsibilities toward the federal authority: seeing that federal elections are properly held; choosing presidential electors; protecting civil liberties of all United States citizens; and carrying out federal court orders.²

Included in the bonds of union are also powers which are shared by the federal authority and the states. These "concurrent powers" include: taxing and borrowing; adopting legislation in areas of mutual interest; regulation of commerce; and setting up courts.³

¹Ferguson and McHenry, loc. cit.

²Binkley and Moos, op. cit., p. 91.

³Ferguson and McHenry, loc. cit.

Thus a type of "partnership" exists between the several states and the federal authority. The states actually are unequal partners in this union, for although both exist as partners for the benefit of all the people, the powers of the federal authority in acting for all states cannot really be challenged. Moreover, the federal courts are the umpires of the federal system.

A broad area exists, however, which is not covered by the Constitution. In this area of vagueness, policy is the controlling factor. Today the American people as a general policy expect more services from their governmental system than ever before. Many times only the federal authority has the power and funds to carry on vast service programs. At the same time, the American people wish to maintain vigorous state government. Since the depression of the 1930's, the evolution of federalism in the United States has developed mainly in this public service area. The federal authority has gradually encroached on powers formerly thought to belong only to the states; i.e., there is a tendency toward "federal centralization." Yet it should not be expected that the federal-state relationship could remain static forever, nor even for two hundred years. Altered economic and social conditions demand changes in governmental authority. In the history of the United States such changes have almost always tended to give the federal authority additional powers at the expense of the states. This trend may be antifederal in nature; yet when new powers

were refused the federal authority, crises generally perturbed the Union.¹

Today the federal authority in the governmental system of the United States possesses vast powers scarcely dreamed of by the constitutional fathers. The powers of the federal authority have grown enormously in commerce and tax fields in order that the demands of twentieth century life may be properly met. It is fortunate that the American Constitution has proved to be as flexible as to allow adaptation without this destroying the federal system.²

This leads to another important innovation by the American constitutional framers concerning federalism; i.e., the right implicitly given to the federal judiciary to nullify legislative or executive acts as unconstitutional in order that the supremacy of the federal Constitutional may be maintained. The first judicial case declaring such an act (or part of an act) unconstitutional was the famous Marbury v. Madison opinion. In this decision the Supreme Court expanded its functions to include original jurisdiction over cases which initially were only under its appellate jurisdiction. In so doing, the Supreme Court caused constitutional amendments to be few in number and constitutional development to evolve smoothly. The American

¹William Anderson, The Nation and the States, Rivals or Partners? (Minneapolis: University of Minnesota Press, 1955), pp. 134-46.

²Ferguson and McHenry, op. cit., pp. 71, 74, 101.

Civil War was the only exception to this rule, and then the Constitution and its order had to be restored by force.

Following the Civil War, the adoption of the thirteenth, fourteenth, and fifteenth constitutional amendments were important steps in the evolutionary development of the American federal Constitution. In effect, the Amendments, added by the northern victors, used the slavery issue to give the Supreme Court power to prohibit certain actions by the states against their own citizens. These amendments are still having repercussions today.¹

Further centralization of powers in the federal authority occurred as a result of the two World Wars and the "great depression." Especially during the depression the prestige and power of the states suffered as Congress and the federal executive, through numerous aid administering agencies, undermined the states' control of relief.

Thus, due in part to the dynamic character of changing times, the federal authority has gained power in an anti-decentralization trend at the expense of the several states. This has occurred chiefly through the national assumption of former state powers in the areas of commerce, tax and police powers.² Nevertheless, the additional burdens which have

¹Spiro, *op. cit.*, pp. 23, 879.

²Graves, *op. cit.*, pp. 23, 879.

thereby been thrown upon the federal authority have caused the revival of interest in a movement to restore some of the state's powers and former prerogatives.¹

After having examined the principal theories on which the federal system of the United States is based, it is now necessary to examine the machinery through which these theories are applied. As a federal union the United States consists of fifty federated units (states), which have grown from the original thirteen. Being a federal union, each of the states maintains a system of bureaucracy, courts, and local government. The states are represented in the federal union through the upper house of the federal legislature (the Senate) according to constitutional provision. Each state is represented equally by two senators. The states are also represented indirectly in the federal authority, as former governors often attain high positions in the federal bureaucracy.

The Senate, as the representative body of the federated states, has two important and exclusive powers. The Senate alone must approve treaties made by the President of the union by a two-thirds majority. Simple Senate majority approval is also required for presidential appointment of diplomats, federal judges, and other high federal officials. These two powers can be compared to the one exclusive power of the lower house (the House of Representatives), i.e., the right to initiate all revenue bills.

¹Binkley and Moos, *op. cit.*, p. 99.

Otherwise the constitutional powers of both houses are theoretically equal.

The executive branch of the federal authority is headed by a president. The presidency of the United States, as a single office, combines more functions than similar offices in any other federal system. The President has the central position in the American system, as established by the Constitution, and even more so as built by tradition and practice. Generally, the President and Congress bargain with one another in order to attain mutually satisfactory ends. In practice his power over the legislative branch is much greater than his actual legal powers would imply. His role as head of one of the two parties is as important as his constitutional right to a suspensory veto over legislative enactments.

The judicial branch in the United States is "a hierarchy of federal courts topped by a Supreme Court." The nine members of the Supreme Court are appointed for life by the President subject to Senate approval. The Supreme Court, by its early refusal to issue advisory opinions and in its use of "discretion" in choosing cases to be heard, has shaped its own role. It has power to overrule the decisions of both state and federal courts of lower levels. It can declare state and federal legislation unconstitutional. Through its role as "supreme arbiter," the Supreme Court has kept federal-state relationships on a smooth course of evolution, i.e., except for the Civil War.

The process of change leads us to one last important consideration: the constitutional amending process. The amending process, as set

forth in Article V of our Constitution, is another important innovation of the constitutional fathers. They solved the perplexing problem of combining stability with adaptability by making the amending process difficult but possible. Two methods were made available for amending the Constitution, but only one has been used. This method allows the Constitution to be amended if both houses of Congress pass the proposed amendment by a two-thirds vote and it is in turn ratified by three-fourths of the states. Here again a federal principle is upheld in allowing the states to have the final word on any formal change in the Constitution.

In summing up the nature of the American federal system, it can be said that its efficiency has varied. Politics alone have often been the deciding factor in the functioning of the system, as it cannot be concluded that administrative decentralization in itself has made the system work. To obtain a complete picture of American federalism one would have to consider how and why the federal Constitution was created, how it has evolved, and how it has retained its vitality.¹

Federalism as practiced in Switzerland. The Swiss Confederation has the longest history of federalism of any of today's federal states. Although called a confederation, it is actually a true federal state. The Swiss federal tradition began in the thirteenth century when three districts

¹Spiro, op. cit., pp. 146, 149-50, 152, 158, 160, 437.

were able to throw out their autocratic Austrian rulers. By the seventeenth century the loose union of the original three districts had expanded into a league of thirteen states. It continued in this manner, with only slight changes, until 1848. In 1848, a federal constitution was adopted which established a federal union of cantons.¹ This union came about after a religious civil war and restored order by placing a constitution on the traditions of the former league of states.² The constitution of 1848 was radically revised in 1874. This revised version is the basis of the present Swiss governmental system, but it has also undergone considerable change by being amended over forty times since it was revised in 1874.³

A federal system was a prerequisite for any Swiss union, for besides having four language groups within her population, the various federated units (cantons) had developed very diverse governmental forms prior to unification. Though these varying governmental forms have now disappeared, the Swiss still strongly support the idea of local self-government.

¹Strong, op. cit., pp. 107-8.

²John Clarke Adams, et.al., Foreign Governments and Their Backgrounds (New York: Harper Brothers, 1950), p. 403.

³Spiro, op. cit., p. 56.

Swiss federalism is based chiefly on cantonal tradition and practices, but the Swiss constitutional framers also looked to the American system when they created their federal system. Theoretically the Swiss Confederation is less federal than the United States because the cantonal constitutions depend on the federal authority rather than on the federal constitution. Cantonal rights, as well as national rights, are as secure as in the United States, however, because of the use of initiative and referendum in the Swiss system.¹ The present Swiss Confederation consists of twenty-five federated units, six of which are half-cantons and 19 full cantons. The federal authority of the union consists of a bicameral legislature, an executive council, and a weak federal judicial body.²

In examining the Swiss constitution one finds that federalism is employed in a very different manner than in the United States. The federal constitution there provides for legislative supremacy. But, as previously mentioned, the employment of initiative and referendum preserves the federal system by reserving some power for the several cantons. The cantons can be regarded as possessing a degree of theoretical sovereignty because of this instrument. In general, however, the federal authority is viewed as supreme. In cases of conflict between the two levels of government, the

¹Strong, *op. cit.*, pp. 108-9.

²Spiro, *op. cit.*, pp. 56, 58.

will of the federal authority always prevails.

Other practices which are quite different from the American system of federalism are the cantonal administration of federal legislation,¹ and the constitutional right of the cantons to negotiate certain agreements with foreign countries (subject to approval by the federal authority). Otherwise the more traditional relationship exists with the federal authority monopolizing foreign affairs, commerce, communication, the military and monetary systems. The federal authority cannot levy direct taxes on the Swiss people, but must obtain revenue indirectly by taxing the cantons. In areas of mutual interest the federal authority and the cantons share concurrent powers.² The few remaining areas which are not delegated to the federal authority remain exclusively in the control of the cantons. Thus it can be said that federalism does exist in Switzerland because of the nature of the relationship between the federal authority and the cantons. But, as in the United States, the federal authority continues to encroach on the few remaining areas where cantonal power is still dominant.³

The machinery of the Swiss government also has several unique aspects which vary not only from the federal forms of the United States but

¹Adams, *et al.*, *op. cit.*, p. 413.

²William Bennett Munro, *The Governments of Europe* (New York: The Macmillan Company, 1938), pp. 778-79.

³Adams, *et al.*, *op. cit.*, p. 417.

also from most other federal systems. The Swiss legislature is the supreme organ of the federal union. Somewhat uncommon is the fact that the upper chamber (Conseil des 'etats) has no special powers and, therefore, is theoretically equal to the lower chamber (Conseil national). In practice the upper chamber, which equally represents the cantons, has far less influence than the lower chamber. Yet bills are introduced simultaneously in both chambers and must be approved by both chambers to become law.¹ Again it should be noted that legislative supremacy and dominance of the lower chamber are balanced by the practice of initiative and referendum.

The legislature also has the task of electing the important federal officials of the judicial and executive branches of the Swiss government. The most important are the elections of the plural chief executive office (Conseil fédéral). This seven man executive is elected by a joint session of the legislature. It functions in a manner similar to that of the commission form of municipal government. Each member of the executive acts as the head of a department or agency of the federal government.² Every year the legislature elects two of the executive's members to act as president and vice president of the Swiss nation. They have no important constitutional powers, however, as the offices are necessary chiefly for diplomatic

¹Munro, op. cit., pp. 779-80.

²Adams, et al., op. cit., pp. 414-15.

purposes.¹ It is important to note that in the election of the executive the federal principle is maintained by the practice of giving three cantons permanent representation. Also, no more than one member of the executive can be chosen from any canton, and all members have equal status on the executive council.²

Besides their executive powers, the members of the Swiss executive council also have legislative and judicial functions. The council acts as a type of ministry for the legislature and introduces most of the important bills for legislative consideration. If the bills are defeated, the executive council need not resign. In the judicial field the executive council has only small powers concerning administrative law. Formerly the executive council had greater powers in this field, but these have now been assumed by the federal judiciary.³

The federal judiciary of Switzerland is topped by a single constitutional court (Tribunal fédéral) consisting of twenty-six judges, who are also elected by the legislature in joint session. In reality, the court is more like a whole judicial system than one court. The judges are assigned to various fields of jurisprudence and rarely meet together in a

¹Munro, *op. cit.*, p. 782.

²Spiro, *op. cit.*, p. 58.

³Munro, *op. cit.*, pp. 783-84.

body. One of these judicial divisions upholds the federal nature of the Swiss state, as it deals with conflicts arising between the federal and cantonal authorities. The cantons also have their own judicial systems, as well as some administrative courts which are joint federal-cantonal courts.¹

The highest federal court does not have the power to review legislation or to pass on its constitutionality. The lack of this power has resulted in an unusually large number of constitutional amendments. Nevertheless, the basic structure of the Swiss governmental system has remained essentially unchanged. Swiss politics have been, and are, "adaptable and efficient." When problems have arisen, they have been recognized and provided for promptly.²

In the summing up Swiss federalism one must conclude in the final assessment that "reserve powers" are possessed by the cantons, and that the constitution is supreme. Although there is no judicial review, the constitution is made flexible through amendments which can come from the local levels of government, i.e., through the process of initiative and referendum.³ Yet for all its flexibility, Swiss federalism is also stable. In past decades it has functioned well and has proven its own worth as a governmental form.

¹Adams, et al., op. cit., pp. 449-50, 458.

²Strong, op. cit., p. 110.

³Strong, op. cit., p. 110.

CHAPTER II

THE HISTORY OF FEDERALISM IN GERMANY

I. EARLY STAGES

Early in the nineteenth century the United States and Switzerland already had fairly well developed federal forms of government, but in Germany events which would lead to the establishment of true federal forms a century and one-half later were just beginning. The history of federalism in modern Germany begins with the French Revolution of 1789, which was followed by Napoleon's march across Europe. At that time Germany, as it is known today, did not exist. Before the Napoleonic Wars the German areas of Europe were contained in the remnants of the Holy Roman Empire "which was but a political shadow without any substance." This so-called Empire consisted of over three hundred independent states, which made up the "Germanies." Napoleon, however, redrew the map of Europe, and in creating the Confederation of the Rhine (1806-1814) greatly reduced the number of independent German states. The victorious European Allies, meeting at the Congress of Vienna (1814-1815), after the defeat and abdication of Napoleon, did not choose to re-establish all of the former independent German states.¹ This reduction of the number of German states

¹J. Salwyn Shapiro, Modern and Contemporary European History 1815-1952 (1953 edition; Cambridge: Houghton Mifflin Company, 1962), p. 101.

to thirty-nine and the establishment of the German Confederation (1815-1866) were the two original events which began a political trend on which federalism in Germany could later build. The forces of nineteenth century constitutional liberalism and nationalism should also not be excluded as causative factors in the development of German federalism.¹

Why might these events and forces be considered as the beginning of German federalism? Mainly because they are the basis of two conditions which are essential for the formation of a federal union. Most modern federal states have either been loosely joined in a confederation, as is the case here, or under the rule of a common sovereign prior to their unification. Secondly, the federated units of a federal state generally want unification but not complete unity and the consequent loss of all sovereignty to the union.² In the case of Germany, nationalistic movement and even an all-German confederation were empirical facts. Both of these elements are fundamental for the foundation of a unified state, as well as being readily adaptable to federal forms.

This first German Confederation was a very loose union. It possessed no common executive or judiciary, but it did start a federal tradition. Its legislative organ, a Diet which met at Frankfurt/Main, took on a form

¹Marshall Dill, Jr., Germany: A Modern History (Ann Arbor: University of Michigan Press, 1961, p. 69.

²Strong, op. cit., p. 99.

which has served as a model for German federal upper chambers up to the present day. The Diet was actually a chamber of ambassadors, its members being appointed by the local state rulers. The delegates had to act in accordance with their ruler's instructions, and they could be recalled at any time.¹ The confederation was not a great success, and it was quite a novel idea in that age. But even though this loose union of sovereign states was not politically effective, it was important as an all-German political entity and as a basis for future unity.

The next event which influenced the growth of a German federal tradition was the creation of a Customs Union (Zollverein) by Prussia in 1819. Although dominated by Prussia and instituted for selfish economic reasons, the Customs Union was politically important because it accustomed the German people to a federalistic union of German states (excluding Austria), and because it tied the states closer together in a mutually beneficial federal relationship. The union grew gradually, and by 1844, almost all of the German states were included within its tariff boundaries.²

In 1848 a wave of revolution swept across Europe and Germany. On March 31, 1848, a group of revolutionary German liberals met at Frankfurt/Main and decided that elections should be held throughout the German

¹Shapiro, op. cit., p. 103.

²Dill, op. cit., pp. 89, 91.

states to choose a representative German parliament. The Diet of the German Confederation (also at Frankfurt) had lost the support of the various princes and it became associated with the demands for elections. Irregular elections came to be held, so that an unrepresentative parliament was elected. The new parliament thus inherited the legal powers of the former Diet. Assuming that it represented all of the German people, it immediately began to draw up an all-German constitution. This work continued into 1849. By that time it was apparent that Austria must be excluded and that Frederick William of Prussia would have to be the emperor of the new political union if it were to endure. In March, 1849, a constitution creating a federal union with a hereditary emperor was adopted. It provided for a bicameral legislative body, whose upper chamber was to be appointed by the governments of the states, and whose lower chamber was to be elective. Frederick William IV of Prussia did not accept the emperorship when it was offered to him. His refusal of the crown caused the new political entity to be aborted, and in 1850 the Diet of the German Confederation was re-established.¹ Although the federal state which was envisaged by the 1848-49 constitution was abolished before having a chance to prove itself, the fact that it had been established in theory was significant for the future.

The next important phase in the development of German federalism began in 1866 and continued up until the end of World War I. This

¹Ibid., pp. 109-11, 121.

included the North German Confederation and the German Empire. In 1866 Otto von Bismarck, the Prussian Prime Minister, goaded Austria into war. The well trained Prussian army in the Seven Weeks War easily defeated the Austrians and her southern German allies. After dictating the terms of the peace treaty, Bismarck created the North German Confederation after declaring the old German Confederation non-existent.¹

The North German Confederation consisted of twenty-two German states north of the Main River. Its constitution was chiefly the personal work of Bismarck. This constitution, adopted in 1867 by an elective convention and ratified by the member states, allowed Prussia to dominate the new federalistic union.²

Bismarck had prepared the document carefully and, with minor changes, it remained in force as the constitution of the German Empire (1871-1918) up to the end of World War I. The Prussian king was the hereditary president of the Confederation. He named a chancellor who was responsible to him only. The first chancellor (Bismarck) acted as a one-man cabinet. He was also the chairman of the upper chamber of the legislature (Bundesrat). Actually the members of this upper house were ambassadors representing the autonomous governments of the member states. Prussia

¹Ibid., pp. 138-39.

²Shapiro, op. cit., p. 242.

had the most votes (17) in this body. Only the upper chamber had the right to introduce legislation into the lower chamber of the legislature (Reichstag). In reality, the king, through the chancellor, controlled the seemingly democratic, federal state.¹

II. THE GERMAN EMPIRE (1870-1918)

In 1870-71, just three years after the establishment of the North German Confederation, another important event occurred in the history of German federalism: the German states defeated the French in the Franco-Prussian War and thereupon established the German Empire. The Empire consisted of twenty-five kingdoms, principalities, and free cities from both northern and southern Germany. It superceded the North German Confederation as a political entity but retained its federal form.² The Empire might best be pictured as "a federation of monarchies."³

The Empire, like the two confederations before it, remained a federation of unequals. Because of size, population, and the new constitution, Prussia continued to play a dominating role. Prussia ruled and paid only "reluctant deference" to the requests of the other members of the federation. Thus the Empire was federal in form but was never a true federation.

¹Dill, op. cit., p. 140.

²Shapiro, op. cit., pp. 248-49.

³Morely, op. cit., p. 2.

The constitution of the Empire divided governmental powers between the federated units and the imperial authority. It was quite generous in the number of powers which it left to the federated units. The most important of these was the degree of competence which it gave to them in their administration of federal law.

A parliament, similar to that of the preceding North German Confederation, was the legislative organ of the Empire. A Bundesrat represented the federated units and a Reichstag the people. The Bundesrat had fifty-eight members unequally distributed between the various federated units. Members were appointed by the heads of their own unit government for indefinite terms. Voting was by blocs according to instructions received from the delegates' home unit.¹ The Bundesrat was the dominant chamber under this system, chiefly because of its power over the actions of the Reichstag, and also because of its right to act as a supreme court in certain instances.² Nearly all of the important bills originated in the Bundesrat. The Reichstag was inferior, although theoretically equal in the lawmaking process, because it could be dissolved at any time by the emperor with the concurrence of the Bundesrat.³

Besides furthering the federal tradition in Germany, the Empire

¹Munro, *op. cit.*, pp. 601, 604-5.

²Adams, *et al.*, *op. cit.*, p. 872.

³Munro, *op. cit.*, p. 605.

period is important because Germany then experienced parliamentary government for the first time. Also, one could for the first time use the term "Germany," as the Empire was the first truly unified German national state. Of course, particularist sentiment remained strong, as can be seen by the construction of the Bundesrat in particular and in the federation in general. But, at the same time, the adoption of a federal system allowed for this particularist element while establishing the tradition of a federal authority in a newly unified state composed of all the German states.

The German Empire, supposedly the strongest and most efficient government of its day, fell apart in November, 1918. Its total collapse surprised the world. After suffering defeat in World War I, the German Emperor, William II, abdicated and turned the government over to the socialist leader Friedrich Ebert, who established a provisional republican government.¹ This provisional government then authorized the signing of the armistice and sought to carry on the functions of government until a new constitution could be drafted.

III. THE WEIMAR REPUBLIC (1919-1933)

After universal male elections based on proportional representation were held, a constitutional assembly met at Weimar in February, 1919.

¹Ibid., pp. 599, 607.

The assembly set about the task of drafting a new constitution for the German state as quickly as possible.¹ A constitution was finally adopted in the summer of 1919 after lengthy argument and discussion. This Weimar Constitution must be considered in detail because the federalism it embodied was later used as a pattern by the framers of the Bonn Basic Law.²

The Weimar Constitution's most striking aspect was its great length. It clearly showed the influence of American, Swiss, and French governmental systems, yet was created mainly from German precedents.³ It consisted of the two main sections: (1) the first 108 articles dealt with the structure and function of the federal authority; (2) the last 58 articles dealt with the basic rights and duties of the people. When the Weimar Constitution was created, most political scientists thought of it as "the model of modern constitutionalism." Unfortunately, it was not adapted to meet change or the problems of the chaotic times in which it was established. As a result it was replaced by a dictatorship less than fifteen years after it had been adopted.⁴

Turning back to the constituent assembly, one finds that at the

¹*Ibid.*, p. 609

²Adams, *et al.*, *op. cit.*, p. 887.

³Spiro, *op. cit.*, pp. 419, 421.

⁴Dill, *op. cit.*, p. 249.

outset of discussions the basic problem was whether to establish a unitary or a federal German state. A great deal of popular sentiment favored the creation of a new unitary state, which would have meant a break with federal tradition and the predominance of Prussia. Particularist sentiment, especially among the Bavarian delegates, could never be overcome. Hence, the issue was decided in favor of a federal state. Thus, the various states, now called Laender, were in a position to retain a great deal of residual power, while the new federal authority had little more real power than its predecessor in the Empire.¹ Federalism was given more emphasis in the Weimar Republic than in its predecessor, however, chiefly due to the absence of the hereditary emperorship of the Prussian King. On the other hand, one could see the weakness of federalism in that Laender boundaries could be easily changed and new Laender created with little trouble.

The Weimar Constitution maximized the powers available to the federal authority under a federal system, leaving hardly any for the Laender. The federal authority was delegated exclusive powers in areas concerning the national interest, as well as unrestricted powers to legislate in such areas as social welfare and industrial controls. The federal authority also had the right to put forward "fundamental principles" on such subjects as taxation, education, religious groups, etc., as guides for the Laender legislatures. In all cases, federal legislation took precedence over that

¹Strong, op. cit., p. 118.

enacted by the Laender. Judicial review was available as the means of deciding federal-Laender jurisdictional disputes.¹

Thus the Weimar Constitution attempted to transform the German nation, in one motion, from an "imperial autocracy" into a federal republic. Unfortunately, this attempt carried things "too far and too fast".² The results were catastrophic for the cause of the Republic and federalism in Germany.

To grasp more clearly how federal principles were actually applied in the Weimar Republic, it is necessary to examine the machinery of the Republic's government. The legislative branch of Weimar consisted of a bicameral parliament. The Laender were represented in the upper chamber (Reichsrat) by one or more delegates, but no one Land was allowed to control more than two-fifths of the chamber. The members of the Reichsrat were again more or less ambassadors from the Laender governments. The powers of the Reichsrat included the right to initiate legislation and to return disapproved legislation to the lower chamber (Reichstag).³ Actually, the Reichsrat was not given a chance to pass directly on legislation coming from the lower chamber, since bills went directly to the President. The Reichsrat's veto was merely suspensive, since when its

¹Ogg and Zinc, op. cit., pp. 630-31.

²Munro, op. cit., p. 611.

³Dill, op. cit., p. 267.

objections were filed with the Ministry the Reichstag could again consider the legislation in question. But, if the Reichstag did not wish to reconsider the legislation, the President had the choices of pigeonholing it indefinitely or turning it over to the people in a referendum.¹

From the above description of the powers of the Reichsrat it is clear that the Reichstag was designed to be the predominant legislative chamber and chief lawmaking body of the Weimar Republic. Although set up to be a body with vast prestige, the Reichstag was of little practical value due to the multiplicity of political parties within it. Its instability can be seen from the fact that the length of office for Ministries in the Republic averaged eight months.²

The most novel provisions of the Weimar Constitution dealt with the office of the President. The Weimar President was given a broad and imposing list of powers, which were weakened only by the requirement that the chancellor or minister concerned approve his actions. The chancellor and Ministry were in turn responsible to the Reichstag. The most notorious of the President's powers was embodied in the famous Article 48 of the Constitution. This article gave him power to rule by decree in case of a national emergency; and almost anything could be made to appear as

¹Munro, *op. cit.*, p. 616.

²Ogg and Zinc, *op. cit.*, pp. 633, 638-39.

such in the troubled times of that era. This power was abused almost from the beginning of the Republic. It also allowed anti-Republic forces ultimately to destroy the Weimar Government.

In a summary, one might conclude that the Weimar Constitution and the federal system which it established failed because they were ahead of the times. Germany in the 1920's was not ready to accept such a complete parliamentary regime. Structural weaknesses within the Constitution itself may also be blamed. It is clear now that the Weimar Government was not properly set up to solve the grave economic and other problems that were soon to occur.¹

Yet despite its serious inadequacies, the Weimar Republic was a true federal state created with good intentions. Its federal aspects included constitutional supremacy, distribution of powers between the federal authority and the Laender, and a federal court to decide disputes between the two levels of authority. But as a federal state it was unique because: (1) the division of powers was not firmly fixed; (2) the Laender were represented unequally in the Reichsrat; and (3) the popularly elected president acted as chief executive through a ministry responsible to the Reichstag.²

¹Munro, op. cit., pp. 612-13, 619.

²Strong, op. cit., p. 120.

IV. OCCUPATION PERIOD (1945-1949)

It is important to begin any consideration of the present government of the Federal Republic with the occupation period following World War II, as that period was the formative stage for the governmental system and constitution of the Bonn Republic. Also important is the fact that during this time the Allied occupying powers intervened a good deal in the creation of the new governmental system, especially by reserving for themselves the right to pass final judgment on any constitutional document which the Germans might draw up.

The occupation period may be divided into two distinct phases, but only the first phase (1945-1949) is to be considered here. It is not necessary to deal with the second phase (1949-1955), because during this phase the government of the Federal Republic had already begun to function under the Basic Law. Responsibility had been taken by then from the military governors and placed in the hands of civilian occupation authorities. These civilian authorities merely supervised and assisted the new German Government but did not interfere with the actual functioning of the new system. Allied military forces were maintained on German soil, however, as a security measure.¹

Nazi Germany capitulated in May, 1945, and the Allied forces of

¹Ogg and Zinc, op. cit., pp. 703-4.

Great Britain, the United States and the U.S.S.R. proceeded to take control of all German territory west of the Oder-Neisse line. After complete control of all Germany was gained, the Allied troops were redeployed so that they might occupy separate occupation zones. Russian armies occupied the eastern zone, the British the northwest zone, the Americans a south and central zone, while the French were invited to occupy the southwest Zone.

Until the latter stages of World War II the Allies had not given much attention to drawing up a plan for occupation, since their foremost objective was to win the war. In fact, the problem of occupying Germany was not studied in detail until the Potsdam Conference in July, 1945, after the fighting in Europe had ceased. At the Potsdam Conference, which was attended by the heads of the Russian, British, and American governments, several agreements were made concerning Allied occupation of Germany.¹ Prior to this, at the Yalta Conference in February, 1945, the Allied leaders had merely set vague aims for occupation: i.e., Germany would be divided into occupation zones; the French would be invited to participate in occupation; and a co-ordinated administration of the four zones would be assured under some form of central authority in Berlin.² The leaders at Potsdam proceeded to fill out the details of this brief outline.

¹Ibid., pp. 702-4, 706.

²Lionel H. Laing, et al., Source Book in European Governments (New York: William Sloane Associates, Inc., 1959), pp. 344-45.

In the Potsdam Protocol the Allies stated that their object in occupation was "to prepare for the eventual reconstruction of German political life on a democratic basis and for eventual peaceful cooperation in international life." Also, in the Potsdam agreement the Allies decided to treat occupied Germany as an economic unit with the political structure being as decentralized as possible. No central government was to be established immediately.¹

The agreement reached at Potsdam is important to this study of the German federalism because: (1) it left the future open for the creation of a central German government which would be built from the bottom up; 2) the failure of occupied Germany to be treated as an economic unit hastened the establishment of the Federal Republic.

By September, 1945, it was already apparent that the Russians were not willing to cooperate in administering the occupation zones with the other three Allies, since the Soviet zone frontier had been sealed off. The three western occupiers also sharply disagreed among themselves in regards to occupation policy.²

At Stuttgart in September of 1946, Secretary of State Byrnes made clear the American policy toward occupied Germany. Although his

¹Ibid., pp. 351-53.

²Adams, et al., op. cit., p. 876.

speech contained little that was new, it did set forth official American policy as of 1946.¹ This policy was: that the time had come to regard "zonal boundaries" only for security purposes and not as economic or political units; that transportation, communication, and postal services should be organized for Germany as a whole; that the German people be allowed to govern themselves under a provisional German government as soon as possible; and that this provisional government should prepare a "draft of a federal constitution for Germany."²

In 1947, the United States made its policy for a future federal form of German government even more definite. The Joint Chiefs of Staff directive 1779 stated:

...the most constructive development of German political life would be in the establishment throughout Germany of federal German states (Laender) and the formation of a central German government with carefully defined and limited powers and functions. All powers shall be vested in the Laender except such as are expressly delegated to the Central government.³

The British were also in favor of establishing a central German government with a federal form at that time. They did not require, however, that a new German central government be as fully federal as the

¹Ogg and Zinc, op. cit., p. 876.

²United States Department of State, Germany (1947-1949): The Story in Documents. (Publication 3556. Washington: Government Printing Office, 1950), pp. 4-7.

³Ibid., p. 35.

Americans or French demanded. The Russians could not even be approached on the subject. The disunity and divergent views of the Allies were soon so great that the Russians and the French would not implement the provisions of the Potsdam Protocol relating to the establishment of central administrative agencies in Germany.¹

One of the main topics of discussion at the 1947 conference of foreign ministers in Moscow concerned the nature (unitary versus federal) of a future central government for Germany. At this point the United States, France, and Britain stood together behind the plan for a decentralized central government, as opposed to Russian support of a unitary system.² By 1948 the split and the tension between the three Western Allies and the Russians had reached a grave point. The Central Allied Control Authority broke down, and it was quite apparent that some form of occupation machinery higher than the zone level would be needed in the three western zones. The ultimate withdrawal of the Russians from the Allied Control Authority seemed a good justification for the establishment of a central government in Western Germany.

The British and Americans, realizing the inadequacy of the central control authority, had by this time already implemented a "bizonal organization" to supervise their two zones. This bizonal administration

¹Ogg and Zinc, *op. cit.*, p. 707.

²United States Department of State, *op. cit.*, pp. 58-9.

might be considered a federal type structure. The bizonal machinery included a bicameral legislature. The upper chamber of this unit represented the Laender within the zones equally. There was also an executive council of six as well as a high court. This functioning "bizonia" government was important because it gained French support for the establishment of a central government for all of Western Germany. As the French saw the worth of this new system, they slowly began to integrate their own zone into the structure of "bizonia".¹

After further delay and hesitation on the part of the three Western Allies, a decision to begin the work of creating a West German State was reached at the London Conference in 1948. The bizonal experiment had been useful, but it was only transitional in nature. Finally, France also had come to the conclusion that further delay in re-establishing a West German State would be dangerous.²

Meeting at the London Conference were representatives of France, Great Britain, the United States, and the Benelux countries. The Benelux countries had been invited to attend because of their special interest as neighbors of the new West German State. After meeting from February to June, the diplomats at London issued the following recommendation:

¹Ogg and Zinc, op. cit., pp. 716, 743-44.

²Laing, et al., op. cit., p. 361.

...the delegates have agreed to recommend to their governments that the military governors should hold a joint meeting with the Ministers-President of the western zone in Germany. At that meeting the Ministers-President will be authorized to convene a Constituent Assembly in order to prepare a constitution for the approval of the participating states.

The constitution should be such as to enable the Germans to play their part in bringing to an end the present division of Germany not by the reconstitution of a centralized Reich but by means of a federal form of government which adequately protects the rights of the respective states, and which, at the same time provides for adequate central authority...¹

The recommendation made by the London Conference was formally approved by the governments concerned. The three Military Governors were then notified that they should take further steps to see that a central government for Western Germany was forthwith established.²

The three occupation powers, however, were still not in complete accord about the future of Germany. The British and American negotiators had a hard time convincing the French that a German constitution would be of little value if it were not primarily a German creation. Negotiations were slow because the French insisted on linking the governmental question with issues concerning international control of the Ruhr, the Occupation Statute, and protection of foreign investments in Western Germany.

¹United States Department of State, *op. cit.*, p. 77.

²Harold Zinc, *The United States in Germany* (1944-1955) (Princeton: D. Van Nostrand Company, Inc., 1957), p. 185.

Meanwhile the West German political leaders had met to discuss the implications of the London Conference. In the Koblenz Resolution the various political factions agreed to accept the offer to call a constituent assembly for the purpose of drafting a constitution for West Germany. They chose, however, to call the assembly a "Parliamentary Council" (Parlamentarischer Rat), and designated its purpose as the drafting of a provisional basic law rather than a constitution. These two changes were adopted to emphasize the hope for eventual reunification. In their resolution the German politicians also included a list of objections to, and rephrased some of the provisions of, the London Agreement. Their main demands were that the parliaments of the several Laender should ratify the constitutional draft, rather than the people directly and that the Laender parliaments should elect the members of the Parliamentary Council.

On July 15, 1958, the Military Governors were informed by the Ministers-President that the Koblenz Resolution was not acceptable and that the London Agreement was regarded as being final. Thus the Germans had to back down, but they did not back down as much as the Military Governors had hoped. The occupation powers also had to make some concessions, among which were the acceptance of the terms "Basic Law" and "Parliamentary Council."

To the Germans, the least acceptable part of the London Agreement was its association of the future constitution with an occupation

statute. They felt that perhaps the German people would not accept this. Without heeding German opinion on the matter, the three occupation powers went on to adopt an Occupation Statute.¹ As it turned out however, the Occupation Statute, which concerned the rights that the three occupation powers reserved for themselves after the establishment of a West German government, had a minimal effect on the deliberations of the Parliamentary Council. It was not, in fact, completed until after the Basic Law had been drafted in its final form.² The Occupation Statute remained in effect until 1955, but in general it did not hinder the functioning of the German government. The occupation powers were concerned only in matters immediately concerning the occupation, and they did not use their powers under the Occupation Statute to interfere to a great degree with the functioning of the West German government. Occupation technically ended in May, 1949, when the Basic Law was adopted.³

As regards developments in the summer of 1948, the next important step occurred in August. At that time a committee of experts, authorized by the Ministers-President of the Laender, met at Chiemsee

¹Carl J. Friedrich, "Rebuilding the German Constitution," The American Political Science Review, XLIII (June, 1949), p. 468-73.

²John Ford Golay, The Founding of the Federal Republic of Germany (Chicago: University of Chicago Press, 1958), p. 22.

³Dill, op. cit., p. 441.

to draw up some "guiding principles" which the Parliamentary Council could rely on when it met in September. The committee of experts, however, produced more than "guiding principles." A complete constitutional draft (plus the reasons and logic behind the various articles of the draft) was the outcome of this meeting of experts. The work of the committee was regarded very highly. In fact, the Basic Law, in its final form resembled the "Chiemsee Draft" very closely. The "Chiemsee Draft" had, in turn, been based on the new Laender constitutions and the Weimar Constitution.

Also in August, 1948, the delegates to the Parliamentary Council were chosen by the parliaments of the respective Laender. Delegates were chosen proportionately to represent the strength of the various political parties in the lower chambers of the Laender parliaments. Sixty-five delegates and five observers from Berlin were elected. By party affiliation the delegates were divided in this manner: Christian Democratic/Christian Social Union 27; Social Democrats 27; Free Democrats 5; German Party, Center Party, and Communist Party 2 each.

The Parliamentary Council convened on September 1, 1948, at Bonn. The Christian Democratic leader, Dr. Konrad Adenauer, was elected to act as president of the assembly. Numerous other officers were also chosen. The work of drafting the Basic Law began immediately.¹

¹Golay, *op. cit.*, pp. 18-20.

As in the pre-Weimar period, the immediate period before the Parliamentary Council convened was filled with strong protests from the conservative businessmen, agrarian interests and extreme nationalists, who had fears that a "liberal social state" would be established. These elements favored the demand of the occupation powers that the new German government be federal in form. They gathered the force of public opinion behind them even to a greater degree than had the pro-federalists of the pre-Weimar period. Thus the majority of the delegates took for granted that the new system of German government would be a federal one, even before the Parliamentary Council was convened.

Disagreement occurred, however, over what form the federal system would take in the new government. The early debates of the Parliamentary Council made it clear that the federal structure of the new government would follow traditional German lines. Even the most pro-federal parties had no intention of switching from traditional German federalism to one like that employed in the government of the United States. This, of course, led to a serious misunderstanding with the American occupation authorities. For both Americans and Germans had interpreted the instructions of the London Agreement (i.e., to establish a federal form of government) in terms of their own experience with federalism.¹

¹Ibid., pp. 27, 41, 44.

The major issues pertaining to federalism which confronted the Parliamentary Council were: (1) the degree of legislative authority and its division between the federal authority and the Laender; (2) the division of financial responsibilities between the federal authority and the Laender; (3) whether or not to retain the traditional council-type upper chamber of the legislature or create a true senate; (4) whether or not to include judicial review of legislation; (5) whether or not to continue the tradition of "delegated administration" of federal legislation.¹ How these issues were settled will be seen in the examination of the Basic Law in the following chapter.

The Parliamentary Council's discussion of issues was quite lengthy, even by German standards. At various times it appeared that agreement would not be reached. In January, 1949, a committee draft of the Basic Law was finally produced. In February this draft was studied by the three Military Governors, who regarded it favorably as a whole. American and French authorities were displeased, however, by the degree of authority which was concentrated in the central government and the vague division of powers between the federal authority and the Laender. They also objected to provisions which seemed to continue the traditional German view of the civil service and the awarding of Land status to Berlin.

¹Friedrich, op. cit., p. 479.

As a result, Military Governors returned the draft to the Parliamentary Council for further revision. A revised draft was then produced, but it embodied little change, for the Germans regarded a strong central government as more desirable than a strong federal system. By early April, 1949, the occupation powers had almost given up on prevailing against German insistence on a strong centralized government.¹ At this time the foreign ministers of the occupation powers met in Washington and agreed on concessions which would break the impasse. Differences over the Basic Law were finally resolved on April 25, 1949.²

The Basic Law thus took on its final form. It was approved by the Parliamentary Council on May 8, 1949, by an overwhelming majority. The Military Governors gave their approval and the Basic Law was then submitted to the Laender parliaments for their approval. All of the Laender, except Bavaria, ratified the Basic Law. It became operative as the government of the Federal Republic of Germany, which began to function in September, 1949.³

Thus the failure of the four occupation powers to come to terms on the treatment of postwar Germany as a political and economic whole led to the establishment of the Bonn Republic. Certainly, at least initially,

¹Zinc, *op. cit.*, pp. 187-88.

²Golay, *op. cit.*, pp. 21-2.

³Zinc, *op. cit.*, p. 188.

they did not desire the consequences of their disunity--i.e., a divided Germany. They were forced into accepting this situation, however, due to conflicts of interests and goals both in Germany and elsewhere in the world.¹ The Cold War was now on in earnest.

¹Golay, op. cit., p. 1.

CHAPTER III

FEDERALISM IN THE BUNDESREPUBLIK (1949-1963)

I. ANALYSIS OF THE FEDERAL FEATURES OF THE GERMAN CONSTITUTION

In attempting to analyze the federal features of the Basic Law, the fact must again be emphasized that this constitutional document is the sum total of a long tradition and heritage of federal governmental forms which were unique to Germany. The Weimar Constitution, linked in turn with the "revolution of 1848, was undoubtedly its most potent positive force."¹

The Basic Law broadly followed the instructions which the three Western occupation powers gave to the Parliamentary Council; yet it has a Germanic quality of its own. The Germans, given a wholly free hand in choosing their governmental system, would certainly have chosen federalism, and for three reasons: (1) as a "direct repudiation" of the centralized system established in the Nazi regime; (2) as a means of restoring autonomy to Bavaria and other particularist oriented Laender which had given it up reluctantly under the first Reich; and (3) as the best hope of reunifying divided Germany in the future.²

The Basic Law definitely establishes a federal system of government in the Bonn Republic. Professor Friedrich compares the federalism of

¹Friedrich, op. cit., p. 463.

²Morley, op. cit., p. 277.

the present German State to the other well-known federal systems in this manner: "it is more federal than Austria and Canada, about as federal as Switzerland and the United States, less federal than the German Empire and the British Commonwealth of Nations." Yet in the past certain critics, notably the French, have said it was not really federal at all.¹

Professors Ogg and Zinc contend that the "federal character" of the Bonn Republic is its "most striking feature." To them it is most significant that the word "federal" appears in the name of the new Republic. Furthermore, they argue that the Federal Republic of Germany "represents one of the most studied attempts to apply federalism in all political history."²

To examine these assumptions for the extent of their validity it is necessary to examine the structure of the Federal German Republic in detail.

Role of the Laender. In considering any federal system careful attention must be paid to the constitutional distribution of powers between the federated units and the federal authority, for this distribution is basic to the "interfederal structure." In most federal structure the distribution of powers between the two levels of government is blurred, however, by

¹Friedrich, op. cit., pp. 706-7.

²Ogg and Zinc, op. cit., p. 748.

national political parties and other overriding political, social and economic elements. This blurring of the distribution of powers is, of course, also quite apparent in Western Germany.

The Laender of the Bundesrepublik, like the federated units in other federal systems, depend on grants-in-aid and subsidies from the federal authority (Bund), in order to remain financially solvent. Most of the Laender governments accept this secondary role rather than interfere with a Bund-created era of prosperity. With the disappearance of Prussia, the dominant German state for over a century, strong particularist elements in southwestern Germany have lost their "emotional target." New Laender have also been created which do not follow traditional particularist lines. Most influential societies and voluntary organizations have been founded on a nationwide basis, thereby ignoring Land boundaries. Local political groups have all but disappeared. From this list one can see that traditional Land loyalties have been increasingly replaced by national sentiment at the expense of the particularist-federal thought.¹ Present day German federalism must be viewed in the light of this growth of national sentiment, for German particularism has lost much of its flavor in the postwar Western Germany.

¹Karl Loewenstein, Political Power and the Governmental Process (Chicago: University of Chicago Press, 1957), pp. 288, 291, 304-5.

The Bundesrepublik consists of a union of ten semi-autonomous Laender. All of these Laender, except Saarland and Baden-Wuerttemberg, existed in 1949 when the Bundesrepublik was established. Some of them have ancient traditions of statehood, while others were the artificial creations of the occupation powers. Because of this degree of artificiality it has been questioned whether the Basic Law is truly a federal compact at all. It is true that the election of the delegates to the Parliamentary Council by the Land parliaments (Landtage) embodied pure federalism, but these elections should be examined more closely. First, the Parliamentary Council and the choice of its delegates were required by an Allied directive. Secondly, the Laender in the Western Zones could hardly be considered as true autonomous states; Hitler had reduced them to mere administrative units. The occupation powers later restored some of their former dignity, but not their political autonomy. Besides, only three Laender (Bremen, Hamburg, and Bavaria) had any traditional history of genuine statehood. The other seven were partially or wholly the creations of the occupation powers.

In any case the Parliamentary Council delegates paid little regard to the status of the Laender. With few exceptions, the delegates pictured themselves as representatives of the German people as a whole and not of the Land from which they were elected. They made this concept clear by vesting the sovereignty in the whole German people rather than in the

several Laender (Article 20-2, and the Preamble). Thus the Basic Law is not a "constitutive act" of the Laender but an enactment of the German people, from which both Laender and Bund receive their authority.¹

The status of the Laender within the Bundesrepublik a few years later had not been enhanced significantly. This is illustrated by the Southwest Case, which will serve as an introduction to the right possessed by the Laender of the Bundesrepublik.

Article 29 of the Basic Law deals with the reorganization of Laender and the modification of Laender boundaries. This has very important implications for the theory of federalism, since pure federalism depends on the existence of federated units. Article 79-3 of the Basic Law insures the existence of Laender, but it does not insure the existence of the present Laender. This was borne out by the decision of the Federal Constitutional Court in the Southwest Case.²

The Southwest Case arose out of a provisional article of the Basic Law. Article 118 provides for the reorganization of a portion of southwestern Germany, which, after much controversy and a referendum, became the present Land of Baden-Wuerttemberg. Reorganization was deemed necessary because that portion of Germany had been unsatisfactorily

¹Golay, op. cit., p. 38-40.

²Plischke, op. cit., p. 14.

divided by the occupation powers in creating their respective occupation zones.¹ Linked to Article 118 is Article 29 of the Basic Law. The latter article envisaged a "general territorial reorganization" of Western Germany along more traditional lines. Initiative and referendum were to be the means by which this reorganization would be accomplished.

However, the Military Governors did not accept Article 29. They declared that the boundaries of the West German Laender, except for the southwestern area, were to remain fixed until such a time as a peace treaty was concluded, thereby suspending complete territorial reorganization. In the meantime the Germans themselves, after further examination of the situations, concluded that complete reorganization was not necessary and offered only a few recommendations for minor boundary changes.

When the Bundesrepublik gained complete sovereignty in 1955, Article 29 became operative. Several initiative petitions were then undertaken, but none reached the referendum stage. Further change of Laender boundaries at the present time seems unlikely, as the federal laws needed to implement the vague provisions of Article 29 have never evolved.² These facts show that the Laender of the Bundesrepublik possessed a higher

¹Wells, *op. cit.*, pp. 17-20.

²*Ibid.*, pp. 21-2.

degree of territorial sovereignty in practice than is actually accorded them by the Basic Law.

A degree of Land sovereignty can also be found in the various powers reserved to the ten Laender in the Basic Law. In this respect the Basic Law possesses a strong federal character. As was the case in the Imperial and Weimar Constitutions, and also in other federal constitutions, the federal authority (Bund) of the Bundesrepublik has only those powers which are specifically granted to it. All other powers belong exclusively to the Laender (Article 70). Among the most important powers which the Bund possesses are its exclusive and concurrent legislative powers. The Bund's exclusive legislative powers, which are found in Article 73 of the Basic Law, are not numerous and in general concern only those areas which require uniform treatment and regulation. The Laender may even go so far as to pass legislation in areas falling exclusively within the Bund's legislative sphere, but only if federal law permits (Article 71).

A further degree of Land sovereignty stems from Article 32-3 of the Basic Law, which gives the Laender power to negotiate international treaties with the concurrence of the Bund in areas where they possess legislative competence.¹ Similar to this provision is Article 32-2, which provides that the Bund must consult a Land if the Land's interests are

¹Zurcher (ed.), op. cit., p. 148.

involved in the conclusion of a federal treaty.

Article 72 of the Basic Law deals with the concurrent legislative powers, i.e., those shared by the Bund and Laender. This concurrent area also provides the Laender with a degree of autonomy. Under their constitutional concurrent powers the Laender may legislate as long as the Bund does not employ its legislative powers in the area concerned. The Laender are excluded from legislating in the concurrent areas, however, if they cannot deal effectively with the problem concerned, or if the action might prove harmful to the federation or to other Laender. Thus Article 72 recognizes German federalism as it existed in Germany before the Nazi regime. That is to say, a high degree of "federal legislative uniformity" again exists. For in reality the Bund controls the area of concurrent powers almost exclusively, since the Laender are not able to act competently on most matters within the concurrent sphere.¹ In fact, there was a good deal of doubt in 1948-49 as to whether the three occupation powers would allow this clause to be inserted in the Basic Law. Since neither the occupation powers nor the Federal Constitutional Court chose to interfere, the legislative supremacy of the Bund in the Bundesrepublik appears to be secure.²

Article 74 of the Basic Law details these concurrent powers.

¹Wells, *op. cit.*, p. 52.

²Golay, *op. cit.*, pp. 61-2.

Included are: the legal and judicial fields; population statistics; laws concerning the rights of association and assembly; laws governing alien residence; the prevention of "German cultural treasures" from being removed abroad; expellee and refugee affairs; military pensions; laws pertaining to economic matters; labor laws; encouragement of scientific research; public welfare; Land citizenship; reparations and war damages; expropriation laws; transfer of private means to public ownership; prevention of the misuse of economic power; promotion of forestry and agriculture; medical law; regulation of food and stimulant transportation; shipping and waterways; traffic and highways; and non-federal railways. This lengthy list provides ample opportunity for Land legislative action, but as previously stated, federal legislation has almost pre-empted this area. In any case, federal legislation takes precedence over that of the Laender in all cases (Article 31).

A concurrent power not directly listed in Article 74 is that of fiscal power. Fiscal power is all important because the level of government in a federal state which controls this sphere will dominate the other level. Therefore, the framers of the Basic Law sought to reinforce the rights of the Laender in this respect by including a novel system of revenue distribution in the Basic Law.¹

¹Loewenstein, *op. cit.*, p. 304.

Between 1945-49, financial responsibility was divided among the Laender, bizonal and zonal organizations, and the occupation powers. The Basic Law and federal legislation have since transferred fiscal power to the Bund and the Laender and have defined the formula of division. Today the Bundesrepublik is one of the most heavily taxed countries of Europe. Combined Bund, Land, and local taxes amount to over thirty per cent of the annual gross national product. This is to be expected, as the cost of post-war reconstruction, payments, and defense has been high. All of this has placed heavy burdens on the treasuries of the three levels of government and has resulted in a contest for tax revenue, with the Bund winning the largest share.

Indeed, fiscal power is one of the most important topics dealt with in the Basic Law. In the framing of the provisions of the Basic Law dealing with fiscal powers, there was agreement only on one point: that the over-centralized fiscal authority of the Weimar Republic should be avoided. Heated conflicts arose among the delegates at the Parliamentary Council, as well as between the delegates as a whole and the occupation authorities, with the result that the final draft provisions dealing with the fiscal power in the Basic Law (Articles 105-115, 120) are very much a compromise. The compromise on fiscal powers has endured, however, in spite of increased Bund centralization. Minor changes were made in 1955-56 by amendments which brought the fiscal provisions somewhat

more into line with traditional German attitudes.¹

The main problem to be ironed out by the Parliamentary Council delegates in the area of fiscal power was one which all federal constitutional framers face--i.e., where to place the power to levy and collect taxes in the federal structure. In solving this problem the West Germans specifically ignored American pressure to adopt a fiscal structure patterned after that of our own federal system. They felt that a system which gave both the Bund and the Laender autonomy would create a weak economic base because of the unique postwar German situation.² Nor did they choose to adopt the Swiss fiscal system which gives the cantons primary fiscal power, with the federal authority obtaining its funds chiefly through indirect methods from the cantons.

The compromise which was finally adopted is found in Article 109 of the Basic Law. The Bund and the Laender are both given fiscal autonomy over their budgets. The Bund is supreme, however, in the sphere of tax legislation, because the Federal Constitutional Court considers that the federal Parliament alone is competent to decide whether such legislation is needed under Article 72 of the Basic Law. Moreover, the Bund is given exclusive tax power over fiscal monopolies and customs, and "priority"

¹Wells, *op. cit.*, pp. 59-61.

²Golay, *op. cit.*, pp. 74, 76.

tax power over all the remaining direct and indirect taxes (Article 105). The financial position of the Laender is assured by two articles of the Basic Law. In Article 106 specific tax revenues are earmarked for the Laender (property tax, inheritance tax, motor-vehicle tax, beer tax, a percentage of the income and corporation taxes, etc.). Article 107 provides for a redistribution of a portion of the Land taxes collected to the Laender which have small tax incomes.

The occupation authorities were very opposed to this latter provision when the Basic Law was adopted.¹ Final implementation of the "equalization" provision (Finanzausgleich) was, therefore, postponed until amendments to Articles 106-7 were adopted in 1955-6. This federal maxim of bearing another's burdens is still not popular with the wealthier Laender. Some observers feel that this complex "equalization" scheme will in the end cause more harm than good. They argue that it will tend to intensify the "tug-of-war" between the rich and poor Laender, on the one side, and between all the Laender and the Bund on the other. The winner of this struggle will surely be the strongest unit involved in the Bund. In the future Bund control might be warranted, for if the two halves of Germany are ever united, the equalization of living standards in Eastern and Western Germany and the amalgamation of their very different economic systems will require an overriding fiscal authority.²

¹Ibid., pp. 83-87.

²Loewenstein, op. cit., pp. 304-5.

One of the most important issues concerning fiscal powers in the Bundesrepublik is the distribution of personal income and corporation tax revenues between the Bund and the Laender (another form of Finanzausgleich). This has been an issue of continuing controversy ever since the Bundesrepublik was founded. The federal Minister of Finance has repeatedly asked for a larger portion of this income, but the Laender, through the action of the Bundesrat, have halted moves in this regard by the Bund. The 1955 constitutional amendment set the ratio of distribution for these two taxes at thirty-five per cent for the Bund and sixty-five per cent for the Laender, effective in 1958. This ratio can be modified biennially, however, but changes are subject to Bundesrat approval. Moreover, if the federal legislation involved in this change causes greater expenditures on the part of the Laender, the Laender's percentage of this ratio must be raised.

Still another form of financial "equalization" results from "general financial allotments" (allgemeine Finanzausweisungen) which the Bund provides to the Laender. The Bund appropriates even larger funds to the Laender for specific purposes, such as housing and refugees, through federal statute. Unlike American grants-in-aid, Bund appropriations generally do not require that the Laender put up a like sum from their own revenues.¹

¹Wells, op. cit., pp. 62-5.

The administration of fiscal matters is chiefly in the hands of the Laender, as a result of delegation of these matters to Laender staffs by the Bund. This decentralization of administration is dealt with in Article 108 of the Basic Law. In 1948-49 there was little dispute over the arrangements made by this provision, because at that time West Germany had neither the funds nor the trained personnel to establish a duplicate Bund-Land tax administrative structure. Furthermore, to avoid loss of time and confusion, taxes and their administration were distributed along traditional lines (direct taxes to the Laender indirect to the Bund). This allowed the existing administrative machinery to be fitted onto a theoretically dual administrative structure. Later, a joint Bund-Land administrative organ was established to administer the "equalization of burdens" provisions.

Since West Germany has become economically viable, much discontent has been expressed over this type of administrative structure. In 1953 the Bundestag voted to amend the Basic Law so that a unified federal fiscal administrative organ could be established, but the proposal never passed. Proponents of the legislation emphasized that a centralized administrative agency would increase the efficiency of tax collection.¹

Under its predominant legislative and fiscal powers, the Bund has thus taken charge of the over-all functioning of the government of the Bundesrepublik. The administration of justice and law has become unified,

¹Golay, *op. cit.*, pp. 83, 86.

as well as the economic sphere. Nevertheless, there are still important areas such as police, cultural affairs and local government which are not included in the list of concurrent or exclusive federal powers. In these areas, which are dealt with in detail later, the Laender still have exclusive legislative power, while the Bund has hardly any contact with them at all. It should be pointed out also that the Laender retain a high degree of legislative power over general legislation through their representation in the Bundesrat, not to mention several other less formal areas where Land-Bund discussions influence federal legislation and action.¹

In addition to their specific legislative power, the Laender possess a good deal of general governmental power. Article 30 of the Basic Law states: "The exercise of governmental powers and the discharge of governmental functions is incumbent on the Laender insofar as this Basic Law does not otherwise prescribe or permit." This article allows for the establishment and functioning of the Laender governments.

The Laender governments are all based on constitutions (Verfassungen) which were adopted between 1946-1953. Some of the Land constitutions were enacted by their parliaments (Landtage), while others were drafted by special constitutional assemblies. These constitutions, and the governmental structures they established, are important because to be effective federated units the Laender must have viable governmental

¹Wells, op. cit., p. 53.

structures. So far, the constitutions of the Laender have been quite stable. They have not been amended to any great extent as they deal chiefly with basic fundamentals of government. Taken as a whole, the Land constitutions are both up-to-date and effective. For the most part, they represent compromises between the various factions of society represented within each Land. Many of them have taken much from previous German constitutions, but improvements on the older forms have been made to iron out most of their deficiencies.¹

Article 28 of the Basic Law spells out briefly the forms that the Laender governments are to take. Paragraph 1 of this article states: "The Constitutional order in the Laender must conform to the principles of republican, democratic, and social government based on the rule of law, within the meaning of the Basic Law." Paragraph 3 goes on to guarantee this type of government through Bund supervision. Parts of Paragraphs 1 and 2 even go so far as to designate the form of local government. Generally, however, the local governments are considered to be within the exclusive jurisdiction of the Laender.²

Structurally, the Laender governments are organized on a par-

liamentary basis. Each Land has its single chamber legislature (*Landtag* or *Bürgerschaft*), except for Bavaria which has a two-chamber legislature.

¹Ibid., pp. 26-8.

²Ibid., p. 75.

A cabinet headed by a Minister-President (Ministerpraesident) is the executive organ of each Land government. In most Laender, stable coalition governments are now in power. In many Laender an intermediate level of authority exists between the top and the local levels of government. It is headed by a Land-appointed official (Regierungspraesident). In general, the Laender governments of the Bundesrepublik have a greater degree of self-government than in either the Weimar or the Nazi regimes.¹

One aspect of Land self-government stands out from all the others, and it is linked closely to federalism; the Land administration of federal law. Found in Switzerland, as well as in the Bundesrepublik, this system of delegated administration (Auftragsverwaltung) allows the Laender to act as administrative agents for the Bund in a wide range of fields. This process is not really new to German government, as it was also practiced in the Imperial and Weimar regimes.² This primary responsibility for the administration of federal law placed in the hands of the Laender acts as a counterbalance to the legislative supremacy of the Bund.³ The occupation authorities had grave apprehensions about this concept, feeling that it would give the Bund too great an opportunity to interfere in the sphere of Land government. Their opposition was finally overcome, and Article 83 of the Basic

¹Neumann, op. cit., pp. 454-55.

²Friedrich, op. cit., p. 715.

³Golay, op. cit., p. 66.

Law establishes a "presumption" in favor of delegated administration.¹ It states: "The Laender execute federal laws as matters of their own concern insofar as this Basic Law does not otherwise provide or permit."

The provisions for delegated administration are a crucial point in the federal system. Many Germans argue that the Bund should be sharply limited in the administrative field. They feel that it was precisely in this matter that the federal structure of the Weimar regime collapsed due to the lack of constitutional checks on federal administrative authority. Such limitations are clearly placed on the Bund in the Bundesrepublik.

The range of direct federal administration is constitutionally limited by provisions which specify the degree and conditions under which the Bund can interfere in the Land administration of federal law. To create this limitation, the Basic Law distinguishes five types of administration: (1) Bund administration of federal law (Articles 86-90, 108-1); (2) Land administration of Land law (Article 30); Land administration of federal law (Articles 83, 84, 108-3); (4) administration of federal law by the Laender under delegated authorization from the Bund; (Articles 85, 108-4); and (5) as a special case of number one, administration of federal law by Bund corporations chartered under public law (Article 87-2, -3). Thus in theory and in practice, the Laender have almost complete control of the administration of both their own and Bund legislation.²

¹Friedrich, *op. cit.*, p. 716.

²Golay, *op. cit.*, pp. 66-7.

The Bund, of course, has exclusive powers of administration in those areas which are in the realm of national interests listed in Articles 87-90 of the Basic Law. The Bund can add to this administrative sphere by creating administrative agencies which fall within its power to legislate. Since this could conceivably fit almost any situation, a further check has been added in favor of the Laender. Parliamentary approval is required for the establishment of new areas of Bund administrative control, and these can only be established in cases of urgent need. This check should eliminate the over-centralization of the administrative structure as it developed in the Weimar regime.¹

The administration of federal law, as well as Land law, by the Laender is not without Bund supervision. The Bund authorities have supervisory power over administrative authorities so that the necessary administrative functions may be carried on efficiently and in a proper manner. This supervisory power may be applied only in the areas where the Bund possesses exclusive or concurrent jurisdiction.² The Bund also possesses the power to formulate general administrative rules and instructions; to see that civil servants are trained uniformly; to request the submission of reports; and to send out commissioners. These powers are set

¹Finer, *op. cit.*, p. 459.

²Joseph Dainow, "The Constitutional and Judicial Organization of France and Germany and Some Comparisons of Civil Law and Common Law Systems," *Indiana Law Journal* XXXIV (Fall, 1961), p. 26.

forth in Article 85, of the Basic Law, and they can be implemented by the Bund only with the consent of the Bundesrat.

If the Laender fail to administer federal laws properly, the Bund has the power to coerce them to do so. Article 37 of the Basic Law provides that the federal Cabinet, with the consent of the Bundesrat, may take steps to compel a Land which is "obstructive" and fails to carry out its administrative duties properly to act in accordance with the will of the Bund. The most important of these steps is the issuing of instructions to the Land as to how it may satisfy the wishes of the Bund. The Land concerned does have power to appeal this Bund action to the Federal Constitutional Court, though in the meantime, the Bund may continue to apply pressure on the Land until the Constitutional Court issues its decision on the matter.¹

In concluding this analysis of the administrative structure of the Bundesrepublik, mention must be made of the West German civil service which is responsible for the administration of Bund and Land legislation. The civil services of the Laender are subject to several constitutional and legislative provisions because of their administration of federal law. This regulation is based on the need for efficiency and uniformity. Article 33 of the Basic Law sets forth the "traditional principles"

¹Golay, op. cit., p. 77.

which are to be followed by the civil servants at all governmental levels. Unlike their predecessors in the Weimar regime, today's German civil servants do expect and accept "policy guidance" from political officials. In the higher ranks of the civil service today, promotion also depends to a degree on political considerations. Article 75-1 authorized the Bund to enact "framework" legislation which establishes the right to provide general principles regulating the legal relations of persons in Land and local governmental service. The local governmental agencies are within the normal jurisdiction of the Laender, but since they also administer federal legislation they are subjected to the higher authority of the Bund.

Between 1955-57 three important federal statutes were enacted under the provisions of Article 75-1. They largely unified civil service regulations for all levels of government. Although they did not require that the Land governments adopt their provisions immediately, the Laender were to enact legislation embodying these principles within a fixed time. This legislation has now been enacted, but only after much controversy. From the point of view of federalism, the degree of freedom allowed the Laender in the implementation of these provisions is worthy of notice.¹

Finally, in connection with the civil service, another federalistic provision of the Basic Law must be mentioned. Article 36 provided that civil servants in high Bund offices are to be chosen from "all Laender

¹Wells, *op. cit.*, pp. 69-71.

in appropriate proportion," and those in lower Bund offices "should be drawn from the Land in which they serve."

In summing up the position of the Laender in the federal structure of the Bundesrepublik, it can be said that the value of the autonomy which they possess in matters still available to them is substantial. The importance of the Laender as sound and functional governmental units within the federal system cannot be questioned.¹ The political power of the Laender has been visibly lessened, however, as the strength of the Bund has grown. The completeness of the development of administrative co-ordination between Bund and Laender has placed serious limitations upon the independent decision-making process of the Laender. Likewise, the political prestige of the Laender governments has receded. Although the Laender have constitutional rights which should allow them to participate in the formation of Bund policy, the organizational structure of the federation in such that in reality it is their own policies which are submerged by pressure from the Bund. Political pressures have thus blurred political responsibilities.²

Role of the Bundesrat. An upper legislative chamber representing particularist German state interests has been included in German federal

¹Finer, op. cit., p. 461.

²Arnold J. Heidenheimer, "Federalism and the Party System: The Case of West Germany," The American Political Science Review, LII (September, 1958), pp. 827-28.

governments since early in the nineteenth century. Thus the delegates to the Parliamentary Council in 1948-49 had a wealth of tradition to rely on when they began to create the Bundesrat. At that time the traditional federal "council type" upper chamber had a good deal of popular support. This type of chamber was advocated because it allows the Laender to participate directly in legislation, and because it permits immediate supervision of administrative functions by persons who are directly involved in enacting them. Supporters of this type of upper chamber justifiably pointed out its successful role in earlier German governments.

The determining factors in 1948-49 were very different, however, from those in 1871 or 1919. The policies of other nations linked with global considerations were all-important factors not present in the formative years of the other two federal German regimes. Besides the pressure brought to bear by the occupation authorities, the West Germans themselves wished to avoid an overly centralized regime after their unfavorable experiences with unitary government. All major political parties in 1948 accept the creation of a federal structure as a necessity. As one of the most important governmental organs in a federal structure, the upper legislative chamber (i.e., the Bundesrat) early became the center of controversy at the Parliamentary Council.

Three different plans were proposed at the Parliamentary Council for the composition of the Bundesrat. The most federalistic of the political

parties, the CDU/CSU (Christian Democrat/Christian Socialist Union), supported a traditional German Bundesrat which would be responsible to the Laender. The Socialists advocated a senate-type upper chamber to be elected by Laender parliaments on a proportional representation basis. The third plan was a mixture of the first two and was offered by the FDP (Free Democrats).

Closely linked with the issue as to the form of the Bundesrat was the question of the power which it would possess and the formula for Land representation of it. Debate on these issues followed party lines. The CDU was most concerned with establishing complete legislative equality (Gleichberechtigung) for the Bundesrat. The CSU half of the coalition was especially behind this principle. The Socialists wanted the lower chamber to have legislative superiority, and they wished to make the Bundesrat as "broadly representative" as possible. A complicated situation arose as the CDU attempted to form a coalition with the FDP and to back a mixed form of upper chamber with legislative Gleichberechtigung. In the meantime, the Socialists had abandoned their concept of a senate-type upper chamber and had allied themselves with the particularist-oriented Bavarian CSU. The CDU/FDP coalition never was formed, thus allowing the CSU/Socialist coalition to create a Bundesrat according to their wishes. This strange coalition of the most centralist and most federalist of parties developed a compromise plan for the composition

of the Bundesrat. It was to take on a form similar to that of the old Reichsrat and would have legislative Gleichberechtigung.¹

A federal council-type of Bundesrat was thus adopted rather than a senate-type form. In general, it was felt that such a body would restrain the national party leaders by awarding the leaders of the Land governments a direct voice--and in some instances a veto--in the formation of Bund policy. The adoption of this type of Bundesrat was clearly an attempt to "institutionalize political diversity," as Bundesrat members were responsible only to, and drawn from, the Land cabinets. It was believed that the party representation in the Land governments would often differ from the ruling Bund coalition. This would result in a very dissimilar "configuration of power" in each of the two federal legislative chambers, for every Land government would have to cast its Bundesrat votes in a bloc after having duly considered both regional interests and party composition. This has not been the case, however, as a developing two-party system in the Bundesrepublik has minimized this effect. In addition one party, the CDU, because of its length in office, has determined to a great extent just how far this principle would be permitted to be practiced.²

¹Edward L. Pinney, Federalism, Bureaucracy, and Party Politics in Western Germany: The Role of the Bundesrat (Chapel Hill: University of North Carolina Press, 1963), pp. 38-40, 42-44, 50.

²Heidenheimer, op. cit., pp. 809-10.

The structure, general functions, and procedures of the Bundesrat are dealt with in Articles 50-53 of the Basic Law. The first of these articles pictures the Bundesrat as a federal organ. Article 51 states: "The Laender participate through the Bundesrat in the legislation and administration of the Federation." This concept may be contrasted to the unitary nature of the lower chamber (Bundestag). The Bundesrat might be viewed as a continuously functioning "balance wheel." It is the main arena of the Bund-Land cooperation and conflict. It is also the closest link between Bund and Laender. Yet it can be the point where the widest diversity of their respective interests appears.

The Federal Constitutional Court may also be viewed as a "balance wheel," but its action is only intermittent and theoretically less important.¹ Actually in a functional federal system such as the Bundesrepublik, a governmental organ which directly participates in the operations of government can act to preserve the federal order more effectively than a judicial body. This is true in the Bundesrepublik because the Bundesrat acts as a balancer through its representation of Land interests. It allows the Laender to scrutinize the actions of the Bund and to intervene if the latter goes beyond prescribed constitutional limitations.²

¹Wells, op. cit., p. 50.

²Golay, op. cit., pp. 44-5.

Article 51 deals with the representation of the Laender in the Bundesrat. Paragraph 1 states: "The Bundesrat consists of members of the Laender governments which appoint and recall them. Other members of such governments may act as substitutes." Paragraph 2 deals with the numerical formula by which each Land shall be represented: "Each Land has at least three votes; Laender with more than two million inhabitants have four, Laender with more than six million inhabitants, five votes." Baden-Wuerttemberg, Bavaria, Lower Saxony, Northrhine-Westphalia, 5 votes each; Hesse, Rhineland-Palatinate, Schleswig-Holstein, 4 votes apiece; Bremen, Hamburg, and the Saarland, 3 votes apiece; and Berlin 4 non-voting members, making a total of 41 voting members. Under this formula there is not such great disparity of representation as was present in the Imperial and Weimar upper chambers. In fact, the Laender are now almost equally represented.¹

Finally, Paragraph 3 of Article 51 states: "Each Land may delegate as many members as it has votes. The votes of each Land may be cast only as a bloc vote and only by members present or their substitutes." The provision for bloc voting has especially important implications because many of the Laender governments are coalitions. Where coalition Land governments do exist, this provision makes it necessary to arrive at a compromise before the Land's votes in the Bundesrat can be cast.

¹Pinney, *op. cit.*, p. 49.

Although chiefly adopted because of tradition, the practice of bloc voting does have its assets. It is especially important to the West German federal system as it ensures the maintenance of a degree of unity in the Land governments. Of course, this procedure also had its drawbacks. Inner conflict within the coalition Land governments is heightened in attempting to reach a compromise decision; valuable minority opinions are often excluded for the sake of expediency; and, in many instances, the Minister-President merely decides how the Land votes in the Bundesrat shall be cast.¹

On paper the powers of the present Bundesrat are not as great as those of the Imperial Bundesrat, though greater than those of the Weimar Reichsrat. In practice, however, today's Bundesrat appears to be more formidable than either of its forerunners. Like them, the present Bundesrat likewise has functions in both the legislative and administrative fields.²

Since the Basic Law deals only briefly with the Bundesrat in Articles 50-53, a federal statute was enacted in 1953 to fill in these vague provisions. Among other things, this statute provides that Bundesrat decisions are to be made by majority vote, and in some cases a special two-thirds majority vote. Generally the sessions of the Bundesrat are public, but closed sessions are permissible.³ The president and vice president of

¹Finer, *op. cit.*, p. 495.

²Golay, *op. cit.*, p. 54.

³Pinney, *op. cit.*, p. 52.

the Bundesrat are elected by its members for one year from among the Land Minister-Presidents. Federal custom dictates that the presidency is to rotate from one Land to another in order of size. This office is important because the Bundesrat President succeeds the federal President if the latter becomes incapacitated or prematurely leaves his office. The Bundesrat President then acts as President pro tem of the Bundesrepublik. The regular duties of the Bundesrat President include presiding over that body, and calling it into session if the federal Cabinet or any Land so requests.¹

The fact that the Land Minister-Presidents are regular delegates to the Bundesrat gives it added **prestige**. These Minister-Presidents and other regular delegates are the official representatives of the Land governments. Because the composition of the Bundesrat is dependent in many cases on the composition of Land coalitions, changes caused by Land elections have a big effect on the stability of the Bund and its legislative program. This allows the Bundesrat to become an outlet for public opinion during the periods between national elections. It should not be assumed, however, that the Bundesrat is primarily the servant of the Land governments. It is rather their spokesman.²

¹Finer, op. cit., p. 459.

²Taylor Cole, "The West German Federal Constitutional Court: An Evaluation After Six Years," Journal of Politics, XX (May, 1958), p. 403.

Members of the federal Cabinet have the right to take part in the discussions of the Bundesrat and its committees. They are obliged to attend Bundesrat meetings if their presence is requested. The Cabinet also has the duty of keeping the Bundesrat informed on the conduct of current Bund affairs (Article 53). This latter function is usually carried out by the Office of the Minister for Bundesrat Affairs. The work of this office is vital since it must maintain a smooth flow of communication between the Bundesrat and the federal Cabinet. This is especially true in cases where the Cabinet relies on the Land Ministers to enforce its policies. To help this flow of communication the Cabinet often assigns representatives from the federal ministry concerned to take part in Bundesrat committee meetings.

The committees of the Bundesrat play an important part in the functioning of that organ. Due to a traditional reliance by the Bundesrat delegates on expert advice, and because of limited time, the Bundesrat leans heavily on committee recommendations. In general, debates in the Bundesrat proper are not lengthy because the main issues of a question have already been ironed out in committee discussions.

The Basic Law almost completely ignores the Bundesrat committees. Federal statutes have, therefore, been enacted to provide the committees with rules of procedure. As of 1960, there were thirteen regular Bundesrat standing committees. Every Land is represented on each

committee, thereby maintaining the federal principle. Actually deputy representatives, who are senior Land civil servants, do much of the committee work. These servants add to the technical expertise of the committees, and are highly regarded in Bundesrat circles.

In summing up the importance of the Bundesrat committees, it can be said that they are indispensable. Virtually all Bundesrat decisions are based on committee recommendations; and voting in the Bundesrat usually follows committee lines. Only rarely does the Bundesrat deviate from committee proposals.¹

One of the least used constitutional powers of the Bundesrat is its right to initiate legislation (Gesetzesinitiative). Although seemingly an important power, the Bundesrat has allowed its right to initiate legislation fall into disuse. In the period from 1950-58, the Bundesrat initiated only 40 bills as compared to 1,623 bills initiated by the Bundestag for the same period.² By 1960 the number of Bundesrat initiated bills had only been raised to 49. This constitutes a mere 2 per cent of all legislation enacted.³

¹Pinney, op. cit., pp. 53, 58-60.

²Heidenheimer, op. cit., p. 825.

³Gerhard Lowenberg, "Parliamentarism in Western Germany: The Functioning of the Bundestag," The American Political Science Review, LV (March, 1961), p. 100.

To initiate bills the Bundesrat must turn them over to the federal Cabinet. The Cabinet then must submit the bill to the Bundestag, stating its view on the bill (Article 76-3). The initiation of a Bundesrat bill is thus an indirect process through the medium of the federal Cabinet. Perhaps it is this indirect method which has driven the legislative prerogative of the Bundesrat into disuse. In any case, it is apparent that the importance of the Bundesrat does not stem from its use of legislative initiative, as is the case in most federal upper legislative chambers.

While dealing with legislative initiative, Article 76-2 of the Basic Law must also be mentioned. This article directs the federal Cabinet to introduce its bills first into the Bundesrat. This procedure gives the Bundesrat a major portion of its work, as most bills are initiated by the Cabinet. The Bundesrat has three weeks to consider a bill initiated in this manner. If it votes favorably on the bill, the bill goes to the Bundestag. But if the bill is vetoed, the federal Cabinet must attempt to reach a compromise with the Bundesrat. In the meantime, the Cabinet must keep the Bundestag informed as to what action is being taken. If it wishes, the Bundesrat can by-pass any compromise action and introduce the bill to the Bundestag along with a statement of its opinion of the bill. In this instance the Bundesrat must again reconsider the bill if the Bundestag takes favorable action on it. This procedure is rarely followed, however.¹

¹Finer, *op. cit.*, pp. 497-8.

The "periodic re-emergence" of a strong upper chamber is roughly parallel to the fortunes of German federalism. In the present federal system a strong upper chamber again exists, but as shown by the preceding paragraphs, its strength is not based on the use of its legislative initiative. Its strength is based on other less recognizable legislative functions. Because of this, the role of the present Bundesrat is ambiguous. A public opinion poll in 1956 showed that 86 per cent of those questioned (in Germany) had either no idea, a vague idea, or a false impression concerning the Bundesrat and its purpose. This is some improvement over 1950, when only 8 per cent of those questioned gave answers showing some knowledge of the upper house.

This "popular ignorance" concerning the Bundesrat may be explained chiefly by the elevated nature of its discussions and its exacting, technical, and sometimes tiresome debates. This may be contrasted with the politically active Bundestag where lively, well-publicized debates occur. Also to blame are the lessening number of plenary meetings which the Bundesrat holds because of a decreased work load and the employment of more streamlined procedural techniques.

To understand the overall legislative role of the Bundesrat it is necessary to examine the procedures which are used in considering legislation that comes before it. In considering legislation the Bundesrat has a twofold role distinguished by the Basic Law. In one category fall all

bills which require the concurrence (Zustimmung) of the Bundesrat because they deal with matters related to Land interests. References to such bills are scattered throughout the Basic Law. In these instances the Bundesrat has an absolute veto.

In another category are all other bills. Over these bills the Bundesrat merely has a suspensive veto (Einspruch). In such cases a simple majority veto by the Bundesrat can be overridden by a simple majority of the Bundestag. Likewise, if the Bundesrat vetoes a bill by a two-thirds majority, the Bundestag can override the veto only with a two-thirds vote (Articles 77-78). In effect, the suspensory veto is an absolute veto if the opposition in the Bundesrat can gain sufficient support among its party members and friends in the Bundestag. This fact tends to submerge purely Land interests to national party considerations.¹

Included in the first category of legislation requiring Bundesrat approval (Zustimmungsgesetze) are all constitutional amendments, all laws affecting the Land administrative structures and boundaries, and various fiscal regulations. The Basic Law mentions these various instances in Articles 29, 79, 84-85, 105-8, 120, 134-35, and 143. The Bundesrat itself has interpreted these provisions in a manner which has tended to maximize its powers in the areas concerned. Up to 1958 no less than 50 per cent of

¹Lowenstein, op. cit., pp. 303-4.

all legislation approved by the Bundesrat was in this category, and if certain peculiar legal enactments are excluded the ratio is as high as two-thirds.¹

The most important area of Zustimmungsgesetze for the Bundesrat is derived from Article 84-1 of the Basic Law. It states:

If the Laender execute federal laws as matters of their own concern, they provide for the establishment of authorities and the regulation of administrative procedures insofar as federal laws consented to by the Bundesrat do not otherwise provide.

The Bundesrat became active in the area of administration when the Bund attempted to establish central control over this area. Much controversy has arisen over this issue and the Bundesrat's interpretation of Article 84. Generally the issue is between the Bundesrat and the federal Cabinet over whether or not the question involved falls into the category of Zustimmungsgesetze. In the end such issues can only be settled by the Federal Constitutional Court.²

In the same area is the right which the Bundesrat possesses under Article 80-2 of the Basic Law to reject or approve ministerial ordinances which implement legislation in various fields. This power is important because it is a common German practice to enact broad legislative provisions and then leave to ministers the promulgation of detailed procedures and provisions in ordinances with the effect of law (Rechtsverordnungen).

¹Finer, op. cit., p. 497.

²Pinney, op. cit., pp. 74-5.

This power of the Bundesrat allows it to become directly involved in many decisions made by federal ministers, and thereby protect Land interests when they are involved.¹

The two articles just mentioned have done much to add to the status of the Bundesrat in the German federal system because of the manner in which that body has implemented them. Indeed, the Parliamentary Council had intended that the Bundesrat would have an absolute veto in cases where the balance of the federal system might be upset in favor of the Bund, but it did not anticipate the limits to which the Bundesrat would stretch this right. The federal Cabinet must now seek Bundesrat approval for the policy it forms within a broad range of topics.² In fact this assumed power has created a degree of legislative equality between the two legislative chambers that is to be found neither in the Basic Law nor related federal statutes.

The Bundesrat has been especially active in the field of finance. With the help of the Federal Constitutional Court, the Bundesrat has been able to assert its right to have a controlling voice in any proposals for a centralized financial administration. Finally, it can be said that the Zustimmung power of the Bundesrat has developed into the "elastic clause"

¹Golay, op. cit., p. 56.

²Finer, loc. cit.

of the Basic Law, "facilitating compromises in controversies over the division of powers in finance and administration."¹

Although not as important as the Zustimmung power of the Bundesrat, its Einspruch (suspensory veto) powers must also be examined to obtain a complete picture of that organ. Before the Einspruch can be invoked against a bill introduced by the Bundestag into the Bundesrat, the mediation process set forth in Article 77-2 of the Basic Law must be attempted. As set forth in this article the mediation procedure is:

The Bundesrat may, within two weeks of the receipt of the adopted bill, demand that a committee for joint consideration of bills, composed of members of the Bundestag and Bundesrat, be convened. The composition and procedure of this committee are regulated by rules of procedure adopted by the Bundestag and requiring the consent of the Bundesrat. The members of the Bundesrat on this committee are not bound by instructions. If the consent of the Bundesrat is required for a law, the demand for convening this committee may also be made by the Bundestag or the Federal Government. Should the committee propose any amendment to the adopted bill, the Bundestag must again vote on the bill.

The technique of "formal parliamentary compromise" stemming from this paragraph is an innovation in federalism and the German governmental tradition. The inclusion of a Joint Mediation Committee (Vermittlungsausschuss) in the West German governmental system replaced the discredited mechanism of referendum, which was employed in the Weimar regime when legislative deadlock occurred. The Mediation

¹Golay, op. cit., pp. 55, 110.

Committee resembles somewhat the Conference Committee of the United States Congress. Like the latter Committee, the Mediation Committee deals only with conflicts which occur between the two legislative chambers over legislative matters. Unlike the Conference Committee, however, the Mediation Committee must serve two chambers of quite different composition, possessing very different and even conflicting interests, and with unequal legislative powers.

Under Article 77-2 all of the three main organs of the West German government which are involved in the legislative process have access to the Mediation Committee under specified conditions. The Bundesrat, however, has easiest access to the Mediation Committee because the federal Cabinet and the Bundestag may ask the Committee to meet only after the necessary Bundesrat approval on bills has been denied. Since 1950, it has been the practice for the Bundesrat to call the Mediation Committee when deadlocks occur over both ordinary federal legislation and legislation which requires Bundesrat consent. The Bundesrat does not usually convene the Mediation Committee if its desires for change are likely to be adopted. It has generally been successful in this respect.¹ But in general, the Mediation Committee is convened whenever the Bundesrat disagrees with a bill.

¹Pinney, op. cit., pp. 77-8.

In considering the bill, the Mediation Committee can do anything to a bill if a majority of its members concur. It can accept, reject, or amend a bill. After the Committee has finished its consideration of a piece of legislation, the bill must be returned to both chambers for their consideration. If rejected in either chamber, it is lost; or in some instances, the Bundestag can overrule the Bundesrat's second objection.¹

The size of the Mediation Committee corresponds to the number of Laender in the federal union. Thus there are eleven members and eleven deputy members from each chamber on the Committee. In resolving a conflict the Mediation Committee finds itself rehashing the previous discussions and findings of committees and the two chambers in plenary session, and renewing debate on the issues involved. But in this respect the Mediation Committee should not be considered to be a third chamber, because it cannot act under its own initiative and does not make binding decisions.

The members of the Mediation Committee are supposedly independent from the instructions of their parent bodies. The meetings of the Committee and its proceedings are not open to the public, so that independence of the members may be insured. In practice the members of the Committee are restricted because of national party limitations.

Through the years since the government of the Bundesrepublik has been in operation, the number of bills to come before the Mediation

¹Finer, loc. cit.

Committee has declined. This is largely the result of not needing to convene the Committee to consider bills which are similar to ones which contain issues that have already been decided. It is also to be noted that the Bundesrat now has fewer complaints to examine than previously, and that it has learned to compromise without creating unpleasant clashes with the federal Cabinet and the Bundestag.¹ Between 1949 and 1960, the Mediation Committee was convened 75 times. The Bundesrat requested it to be convened 70 times, the Cabinet 3 times, and the Bundestag 2 times. These figures show that the Joint Mediation Committee has not been used a great deal, but they do indicate that this legislative device has been used almost exclusively by the Bundesrat as a bulwark against the more powerful combination of the Bundestag and federal Cabinet.²

The main criticism of the Mediation Committee is its extensive use of expert opinions. The high degree of dependence placed on expert advice has tended to reduce the influence of "real political mediation" within the Committee.³ If the Bundesrat is not satisfied with the results of the Mediation Committee's work, it may vote an Einspruch against the compromised bill within one week (Article 77-3). This Einspruch is possible though only against ordinary federal laws which do not require Bundesrat

¹Pinney, op. cit., pp. 79, 82-4.

²Finer, loc. cit.

³Pinney, op. cit., pp. 85-7.

had used this Einspruch power only three times.

To sum up the importance of the Bundesrat's Einspruch powers, one can state that they have little actual value as shown by the infrequency of their use. But this has been a matter of choice of the Bundesrat itself, which has chosen instead to maximize its use of Zustimmung powers.

By this time it should be clear that the Bundesrat was originally envisaged as a federalistic organ. The Christian Socialists in southwestern Germany (known collectively as the Ellwanger Kreis) felt that they had created a Bundesrat which would protect the local party units from centralized party leadership. The Bundesrat was constructed so that it would supposedly act as a check against a national party leader attempting to strengthen his personal influence by co-ordinating the politics of both legislative chambers. The bloc voting system in the Bundesrat was to be one of the chief methods by which national party leaders would be stopped from imposing their wills on individual Land ministers representing coalition Land governments. In this way the Bundesrat plan was unique as the usual federal upper chamber freely allows voting along party lines.

Shortly after Dr. Adenauer's election as Chancellor in 1949, he began an attempt to centralize the decentralized structure of his own Christian Democratic Party. He was largely successful in this attempt because of the coalitions with other parties which he was able to arrange. Yet he was not successful when it came to the centralization of his party in the

Bundesrat. The Bundesrat, including CDU members, refused to approve one of his Cabinet nominees and instead substituted another appointee. The Bundesrat in so acting made a powerful enemy; but more important, it proved that it would not submit to party discipline and political pressure from above.¹

More recent events have since overshadowed this original victory of the Land interests. Since 1949, the West German political scene has been overwhelmingly dominated by two national political parties: the Christian Democratic and Socialist parties. These two parties now have a good amount of party discipline. Thus in the Bundesrepublik today, a two-party system practically exists, with party power shifting gradually from the Land party centers to national party headquarters.

This development has had a tremendous significance as far as the Bundesrat is concerned. The Bundesrat's original role has also changed concomitantly with the trend toward party centralization. The role of the Bundesrat today would appear to be more that of an "instrument for the subordination of Land to Bund policy," than one of anti-centralist protector of Land interests. This change in role has been due, in part, to the growth of importance of the Bundesrat itself through the use of its expanded Zustimmung powers. For as the importance of the Bundesrat grew, the more

¹Heidenheimer, op. cit., pp. 811-14.

tempted were the national political parties to influence their members who were delegates to that organ.

Party influence in the Bundesrat is of special importance to the opposition party. For with a minority in the Bundestag, it is still possible to use the Bundesrat as a means of obstructing the Cabinet's program. At the same time, the Cabinet seeks to broaden its influence in the Bundesrat so that it can gain support for its policies. This competition for Bundesrat votes has turned Land elections into a source of national party interest.¹ Consequently, the national political parties intervene in Land political campaigns, the formation of Land cabinets, and the formulation of Land policy in the Bundesrat. Since these Land elections are not all held at the same time, and at different times than the national elections, some unsteadiness occurs in federal Cabinet, Bundestag, and Bundesrat policies. These elections are especially disruptive in the case of the Bundesrat because of the continuous turnover of delegates at varying intervals.²

Finally mention must be made of one of the most important legislative issues in which the Bundesrat was involved. That issue concerned the establishment of a European Defense Community, and it was an area of conflict spanning several years in the early 1950's.

¹Pinney, *op. cit.*, pp. 88-93.

²Finer, *op. cit.*, p. 499.

The legislation involved had been drafted by the federal Cabinet. It was almost certain to pass the CDU-controlled Bundestag, but there was doubt as to whether it would get through the Bundesrat because of strong Socialist elements there. The actual issue became very confused with appeals made to the Federal Constitutional Court on several occasions. For the Bundesrat this legislation was significant because a group of federal-minded Bundesrat members argued that the Bundesrat should have the right to vote on the EDC treaties as a whole, and not just those parts of the treaty dealing with taxes and other areas of Bund-Land administration. The outcome of the dispute would set a vital precedent determining the potential powers of the Bundesrat as a federal legislative organ.

In April, 1953, the Bundesrat turned the problem over to the Federal Constitutional Court to decide. The Court was to determine if the treaties were constitutional, and if so, whether the Bundesrat had the constitutional power to approve all of, or only part of, the EDC treaties. The CDU raised such an uproar over the issue that Bundesrat never really voted on the treaties as a whole, and they were sent out of the Bundesrat on a technicality. The failure of the Bundesrat to act decisively on this issue caused it to lose prestige and placed it in a poor position for asserting itself on questions of national policy when the Bundestag and Cabinet were on opposite sides. In the political realm this case served as a reminder to the members of the Bundesrat of the

dangers involved when they allowed themselves to become instruments of national party politics.

Signs indicate that the Bundesrat membership is wiser because of their experience with the EDC issue. The Bundesrat as a whole has reacted by seeking "safer relationships." It has sought to redefine its own role by avoiding direct political conflicts with the Bundestag and the federal Cabinet. It has carried this to the point of acting as if it were above party politics, but this is a false conception of reality.¹

The altered conception of the Bundesrat, because of its action in the EDC issue and other more recent issues, has caused some observers to predict that West German federalism is moving toward a crisis period. They feel that the Bundesrat is not fitted to maintain the federal balance since it was not constructed to deal with the changing economic and political scene. In viewing this antifederal trend, the fact should not be overlooked that the passivity of the Laender themselves has caused the Bundesrat to be weakened. This is true even though the CDU and Socialist parties have rejuvenated and strengthened "the small life energy of the Laender, which hitherto had been suffocating on the fringes of decision-making."²

¹Heidenheimer, op. cit., pp. 817-18, 824.

²Pinney, op. cit., pp. 140-41.

In general, the Bundesrat seems to have "scaled down" its own political role. It has recently carried on a campaign to lessen its legislative tasks in order to concentrate on administrative reform. Today it pictures itself more as a mediator than as an active legislature. Thus the original expectations of the three occupation powers and the Ellwagner Kreis concerning the role which the Bundesrat would play in the Bundesrepublik have proven to be largely illusory. It is apparent that in recent years the Bundesrat has done little to maintain the balance between the executive and the legislature branches of the West German government. Federal principles have, therefore, suffered at the hands of "the centralizing tendencies of social reality," and if a crisis were to arise, it is doubtful whether the Bundesrat could again invoke its original constitutional powers.¹

Even with all of its ambiguities, some definite conclusions about the Bundesrat as a federal institution are possible. It can be said that Bundesrat has demonstrated that it is a genuine federal organ by its representation and protection of the interests of the Laender. It is true that in many instances national political parties do determine the interests of the Laender for them, though this is not true in all instances. If the Bund chose to, it and the national political parties could probably exercise complete control over the Land governmental structures. But, short of a

¹Heidenheimer, op. cit., pp. 825, 828.

crisis great enough to cause such a development, the Bundesrat may be expected to continue to uphold Land interests as understood by the Land governments.

Also important as a federal check is the bureaucratic attitude which the members of the Bundesrat have assumed. The professional competence of the Bundesrat members and their expertise in scrutinizing "legislative complexities" has placed limitations on the freedom of the executive branch in legislative and administrative areas. This bureaucratic outlook is also valuable as a protector of the federal structure because of its conservative nature. At the same time, this conservative element is not so rigid as to have stopped progress through socio-economic reform.

In sum, there are grounds for "cautious optimism" over the role of the Bundesrat in the democratic development and preservation of the West German federal system. For if federalism is an accepted principle in the Bundesrepublik, there is little that even an anti-federal Bundesrat could do to harm it as it exists today.¹

The Federal Constitutional Court. The last important federal institution of the Bundesrepublik to be considered is the Federal Constitution Court (Bundesverfassungsgericht). It exemplifies one of the three

¹Pinney, op. cit., pp. 238-44, 246.

basic essentials of a federal system mentioned earlier, i.e., a supreme judicial body which resolves federal-regional and inter-federal disputes through constitutional interpretation. In fact, the Federal Constitutional Court may be viewed as "the most important development in postwar German constitutionalism." Charged with the duty of interpreting the Basic Law and any constitutional question, this judicial organ holds a unique position in the federal structure. It stands "at the apex of the judicial pyramid," yet it is distinct from the rest of the West German judicial system.¹

The three occupation powers did much to encourage the West Germans to adopt such a constitutional court as part of their federal system. The Germans themselves were also very favorably inclined toward the idea of such a court.² The favorable German attitude was strengthened by tradition which began with constitutional proposals for a court with wide jurisdiction at the National Assembly of 1849, and which continued in some form or other down to the end of the Weimar Republic. Little precedent had been established through the decades, however, for a supreme court with wide powers of judicial review. The members of the Parliamentary Council

¹Paul G. Kauper, "The Constitutions of West Germany and the United States: A Comparative Study," The Michigan Law Review, LVIII (June, 1960), 1092-184.

²Finer, op. cit., p. 465.

thus had to combine innovation with precedents provided by the constitutional courts of other federal systems (especially the United States, Switzerland and Austria) in framing the provisions for the new German court.

Although the pressure of the three occupation powers on the West Germans to adopt such a court was a factor, even more important was the German reaction to the Nazi regime. This in turn was strengthened by a reaction to the authoritarian regime which was established in the Soviet occupation zone. In any case, the democratic political groups of Western Germany overwhelmingly supported the general principle of "judicial review" in 1948.¹

Except for broadly specifying the jurisdiction of the Federal Constitutional Court, the Basic Law is quite brief in regard to the court and its procedures and functions. It deals with the court in Articles 20, 41, 92-94, 98-100, and 126. Article 92 designates the Constitutional Court as one of the several courts of the Bundesrepublik by which "judicial authority is exercised." In addition, Section I of the federal statute enacted to deal with the court states that it is, with "other constitutional organs, an autonomous and independent court." The Constitutional Court itself has concluded from this statute and the Basic Law that it is not subordinate to any other federal organ or administrative agency.²

¹Cole, *op. cit.*, pp. 279-81.

²Dainow, *op. cit.*, p. 38.

The jurisdiction of the Federal Constitutional Court is given in several articles of the Basic Law. Article 93 gives the court the right and duty of interpreting the Basic Law and the power of judging the constitutionality of Land and Bund Laws as well as settling disputes that arise concerning the compatibility of these laws with each other and with the Basic Law. In addition, other cases may be assigned to it by federal law. Article 98 gives the court the power to impeach federal judges. Article 99 allows the court to decide on constitutional disputes within a Land if the Land requests it. Article 100 gives the court power to decide constitutional questions which arise in lower federal and Land courts. Under Article 126 the court must decide disputes regarding the continuance of law as federal law.

Somewhat out of the ordinary are the provisions of Article 21-2 and Article 41-2 which give the Constitutional Court jurisdiction in two other specific areas. Article 21-2 allows the court to decide on questions of unconstitutionality "in cases concerning political parties which because of their aims or the behavior of their adherents, seek to impair or destroy the free democratic basis of order or to endanger the existence" of the Bundesrepublik. In a very different vein is Article 41-2 which gives the Court the Power to hear appeals against decisions of the Bundestag.

As the preceding shows, the jurisdiction of the Constitutional Court according to the Basic Law is both broad and specific depending on

the circumstances involved. Indeed, the Basic Law allows any court decision or governmental act to be brought before the court on the charge that it infringes on the constitutional rights of the party concerned.¹ Most important, however, is the power of the court to decide on the constitutionality of Land and Bund legislation.

Besides reviewing the constitutional complaints of the various governmental organs and political institutions, the Constitutional Court also hears constitutional complaints from individual citizens who believe that their constitutional rights have been violated. These cases make up the greatest percentage of the Court's work. Due to the nature and quantity of them, much thought has been given to proposals which would limit the amount of personal constitutional complaints to be brought before the Constitutional Court.²

Article 94 of the Basic Law deals briefly with the structure of the Constitutional Court and the manner in which its judges are elected. It provides that half of the members of the Court are chosen by the Bundestag and half by the Bundesrat. Those chosen cannot be members of the Bund or Land parliaments. This article further provides that federal law will establish the procedures and constitution of the court.

¹Dainow, *op. cit.*, p. 38.

²Cole, *op. cit.*, pp. 286-88.

A federal statute establishing the more detailed structure and procedures of the Constitutional Court was adopted in 1951. This statute was further amended in 1956. The statute provides that the Constitutional Court shall consist of two main divisions, or senates, of eight judges each (originally the number was twelve per senate). The two chambers were created to allow some specialization of judges, and also to ensure an even distribution of cases. The president of the entire Court presides over one senate and his deputy chairman over the other. In each of the senates three of the judges are chosen for life, while the rest have only eight year terms. Perpetual re-election is traditional, however, in the latter instance. In choosing the judges, the Bundestag must establish a special committee for that purpose. No special procedures were established in the case of the Bundesrat.

For the sake of political stability in the Bundesrepublik, the Constitutional Court does not publish dissenting opinions. Also, since 1956, the Court has made it a practice not to issue any advisory opinions.¹

The division of the Constitutional Court into two senates has been constant source of criticism. Originally this division also established two categories of issues which limited each senate to acting in one category. The 1956 amendment to the federal statute dealing with the court altered this, however, because the original distribution of cases

¹Finer, *op. cit.*, pp. 465-66.

between the two senates had proven to be too unequal. Now the Plenum, consisting of members of both senates, can adjust the formula for distributing cases between the two senates in certain instances. When uncertainty arises over which senate has jurisdiction over a specific case, a committee of judges from both senates decides which senate will handle the case.

In the 1956 reorganization an attempt was also made to reduce the work of the Court as a whole. Now committees of three judges in each senate can reject cases submitted to the Court, except when certain specific constitutional issues are involved. No further restraints on the jurisdiction or number of cases allowed before the court are expected. For although most of the court's time is spent deciding constitutional complaints of a minor nature, its reputation and position in the governmental structure have been greatly enhanced because of its ability to deal with such cases. One structural change is still hoped for though, the development of a single chamber court. The gradual diminution in the number of judges sitting on the court has been made in the hope that it may eventually lead to a single chamber Constitutional Court.¹

Even though the Constitutional Court had been provided for in the Basic Law, it got off to a slow start. The enabling federal statute

¹Cole, *op. cit.*, pp. 283-85, 289.

dealing with the detailed activities of the Court was not adopted until 1951. Judges were then elected and, after lengthy discussions between the various political factions, the Court became operational on September 28, 1951, in Kalsruhe, issuing its first decision in late October. Between 1949 and 1951, the Allied High Commission, under the authority of the Occupation Statute, had assumed the chief responsibility of guarding the young Basic Law, even though a temporary German Court had been provided for. The High Commission gladly turned its judicial functions over to the West Germans as soon as the Constitutional Court was established in 1951.¹

After this delayed start, the Constitutional Court was at first still slow to act and very cautious when it did so. The Court acted as if its principal task was to obtain favorable public opinion for its role as an "arbitral power." In looking to the future, the Court adopted a policy of noninvolvement, and acted with great sluggishness when important issues containing political issues came before it. Thus for some time the Constitutional Court followed a policy of "judicial self-restraint." Since these early stages, however, there has been a "marked growth in the judicial confidence and finesse displayed by the Court."² The increased

¹Plischke, *op. cit.*, pp. 116-18.

²Edward McWhinney, "Judicial Restraint and the West German Constitutional Court," *Harvard Law Review*, LXXV (November, 1961), pp. 10, 12, 19.

responsibility and prestige of the Constitutional Court is the result of several important decisions which it has handed down; several of which directly concern federalism. Therefore, it is worthwhile to briefly examine some of the cases involved.

The first federalism case to come before the Constitutional Court was the Southwest Case, which dealt with the territorial reorganization of southwest Germany. The issue had arisen because in 1945 the three occupation powers had divided the historic states of Baden and Wuerttemberg in half when they created their occupation zones. The two northern halves of these states were combined into a single Land (Wuerttemberg-Baden) in the American zone. Likewise, a single Land (Wuerttemberg-Hohenzollern) was created by the French from the southern halves. From 1948 on there was much discussion about the reorganization of these two Laender either as a new combined Land, or to allow them to exist as they did before 1945. Article 118 had been inserted in the Basic Law in order to provide for this reorganization.

Since the Laender involved could not reach an agreement on the reorganization issue, the federal Parliament authorized a referendum to settle the problem in May, 1951. But before the referendum could be held, the Land government of South Baden challenged the federal legislation before the Constitutional Court. The court ruled in favor of the referendum, and a new single Land (Baden-Wuerttemberg) was eventually created. A popular

movement in South Baden still agitated for the establishment of two separate Laender, however, and its leaders again went to the Constitutional Court to seek the right of initiative on this issue. The Court ruled in favor of the initiative petition in 1956, but by then the movement had lost its momentum and by 1960 was almost nonexistent.¹

The shifting of Land boundaries, or their creation or dissolution, directly involves the principles of federalism. Although the Constitutional Court's decisions concerning the Southwest Case were not substantially significant, the fact that it acted as the final arbiter in the matter is important, because in so doing the Court assumed its proper federal role under the provisions of the Basic Law. Thus the federal principle was upheld, and the Court was able to establish precedent and prestige while the Bundesrepublik was still young.

A more important case concerning federalism, which was decided by the Constitutional Court in 1957, was the Reichskonkordat Case. In this case the court upheld the power of the Laender to make policy decisions in the area of cultural matters (specifically in this instance, education) which the Bund had challenged. It did so by utilizing the federal principle found in Article 73 of the Basic Law. This article excludes cultural matters from Bund control by failing to mention them. The issue involved, however, was further complicated because of an international

¹Wells, op. cit., pp. 17-20.

treaty concluded in 1933 between the Reich government and the Vatican.

In its final decision the Constitutional Court held that an international treaty obligation of the Bund did not give it the power to interfere in areas where the Laender had powers reserved to them by the Basic Law.¹ Again in this instance the principle of federalism was maintained successfully against Bund encroachment.

The federal principle, as found in the governmental structure of the Bundesrepublik, was further defined when the Constitutional Court ruled on what the Laender might not do constitutionally in their relationship with the Federal government. Conflict arose in long-standing debate which had been going on between the Government and the Opposition over rearmament. Since the opposition Socialists were outnumbered in the federal Parliament, they carried on the fight through several Land parliaments which they controlled. These Land parliaments passed Laws authorizing referenda on the specific issue of rearmament with atomic weapons, but after the federal Parliament had already passed legislation favorable to such rearmament. The federal Cabinet asked the Constitutional Court to enjoin the referenda from being held, even though they would have no legal basis, because of the embarrassment which the referenda would cause the Bund. Besides, this area was completely within the exclusive control

¹McWhinney, *op. cit.*, pp. 22-23.

of the Bund. The Court obviously decided in favor of the Bund. In this instance the federal principle worked against the Laender by preventing them from usurping power which actually belonged to the Bund.¹

The most important case to date concerning federalism in the Bundesrepublik was decided by the Federal Constitutional Court in 1961. The Fernseh (television) decision has been regarded as a turning point for the Constitutional Court. In this decision the court directly challenged the Bund for the first time on an issue which the latter considered to be vital. As early as 1953, the Adenauer Government had ventured into the field of television regulation. The Laender sharply contested this interference by the Bund in an area which they considered as exclusively theirs by the authority left to them over cultural matters in the Basic Law. They were willing to negotiate, however, and were prepared to split television control with the Bund. No definite conclusion was reached on the matter and the issue remained unresolved. In 1960 Chancellor Adenauer raised the matter again when he attempted to gain complete control of West German television through the creation of a Bund monopoly. To do this, he initiated legislation which would have established a federal authority for control of the Fernseh program. Several Laender took immediate action, and the issue was brought before the Constitutional Court. The Court decided in favor of Land control of Fernseh, because it fell

¹Ibid., p. 25.

within the scope of the Laender's exclusively controlled cultural affairs. The Court also went on in its decision to speak further on Bund-Land areas of competence which are only vaguely enumerated in Articles 70-75 of the Basic Law.

In this instance the Constitutional Court even went so far as to lecture the Adenauer regime on its "political morality". In its decision the Court restated the federal principle in this manner: "the obligation of self-restraint in a federal society is a reciprocal one, involving both Bund and Laender." The Court also referred to its two earlier decisions given in the Konkordat Case and the case on atom rearmament which dealt with the federal relationship between Bund and the Laender. The Bund seemed to have ignored these two decisions from the start. In so doing, it had also ignored the Constitutional Court, which it had never before met head-on, as well as Basic Law.¹

Unfortunately in some respects access to the Constitutional Court is too easy for the various organs of the German government. The Court's availability to decide any constitutional issue makes it also readily available to become embroiled in political conflicts. Its reputation and prestige depend, therefore, on its "self-imposed limitations," as well as the self-restraint of the other governmental organs in their use of the

¹Ibid., pp. 31-33, 35.

Court.¹ If the Court continues to conduct itself as it did in reaching its decision in the Fernseh and other cases, this should present no problem.

The most important consequence of the Fernseh decision, however, concerns federalism in general. In an age when federalism in practice seems to be wasting away in the governments of such nations as the United States and Switzerland, the West German Constitutional Court has given new life to federalism in Germany.² In its short existence the Federal Constitutional Court has been viewed:

As the guardian of a liberal democratic constitution; as the final coordinating agency in the political system; as an experiment in judicial pioneering; as a judicial oligarchy; and a Trojan Horse which conceals behind a judicial facade certain of the realities of German political life.³

But the Court's role still cannot be viewed as being permanent. Although now firmly established as the supreme judicial organ of the Bundesrepublik, its position is still evolving. Out of necessity, therefore, the decisions made by the Constitutional Court must be viewed in respect to the changing political scene in Western Germany.⁴

The Basic Law has provided for all possibilities by placing governmental acts under the guardianship of "a comprehensive system of

¹Kauper, op. cit., p. 1181.

²McWhinney, op. cit., p. 38.

³Cole, op. cit., p. 278.

⁴Ibid.

judicial review." So far this innovation has worked well in a nation where tradition placed these powers in the hands of the legislature. In fact, it appears to be strengthening the entire governmental structure.¹ In spite of continuing discussion of the legal status of the Constitutional Court, it is generally accepted today as "a constitutional organ endowed with a special status alongside the President, and the Bundestag, as well as being the highest court of the land."²

Although viewed with skepticism by the members of the Government in the past, the Federal Constitutional Court now receives more favorable sympathy from them. The Bundesrat has supported the Constitutional Court even more than has the ruling coalition in the Bundestag. Most of the Land governments also view the Court favorably as the protector of their rights against Bund encroachment. In general it may be said that there is no important pressure group in the Bundesrepublik today that would restrict the powers of the Constitutional Court. Popular support for the Court is continuously growing.

In spite of all of the Court's prestige, criticism is still heard concerning certain aspects of its organization and procedure. Some West Germans even feel that the Court has too much jurisdiction under the federal law. The detrimental things which may result if the Constitutional

¹Dainow, *op. cit.*, p. 38.

²Cole, *op. cit.*, p. 283.

Court should become involved in political disputes as well as the impracticability of its two senate structure are pointed out as the Court's greatest weaknesses. Yet even though criticism is evident, no popular movement for reforming the Court has appeared. In fact, the prestige of the Constitutional Court has continuously grown. It is popular with the private citizen as a guardian of his personal rights and also with the higher political organs of the Bund and the Laender. Its personnel are of the highest quality. It has faced crisis and survived with increased respect. Indeed, the Federal Constitutional Court has earned its reputation as the "Custodian" of the Basic Law.¹

Other federal features. The nature of the President's office in the Bundesrepublik is federalistic because of the manner of the President's election and the succession to that office. Actually the President of Western Germany has very limited political importance and influence except in the diplomatic field in his capacity as chief of state. Federalism is linked to the presidential office because the Laender participate in the designation of the President through membership in the Federal Assembly (Bundesversammlung), which is composed equally of members of the Bundestag and delegates of the Land parliaments (Article 54).² The successor to the

¹Ibid., pp. 283, 304-7.

²Loewenstein, op. cit., p. 291.

President, if the latter becomes unable to continue in his office, is the president of the Bundesrat (Article 57). This manner of succession is also federalistic because, in effect, the Laender have then chosen the federal President.¹

It is also necessary to consider the amending process of the Basic Law because of its vital importance in the preservation of the federal system. In creating the Basic Law, as with any federal constitutional document, it was necessary to provide safeguards so that the federal balance might be maintained as long as the Basic Law should exist, yet still allow for a reasonable amount of change.² As a whole, the amending process as set forth in Article 79 of the Basic Law is not too rigid. In part, Article 79 states:

(1) The Basic Law can be amended only by a law which expressly amends or supplements the text thereof.

(2) Such a law requires the affirmative vote of two-thirds of the members of the Bundestag and two-thirds of the votes of the Bundesrat.

(3) An amendment of this Basic Law affecting the division of the Federation into Laender, the participation in principle of the Laender in legislation, or the basic principles laid down in Articles 1 and 20, is inadmissible.

Section 3 of Article 79 is especially important for the purposes of federalism. It prohibits any anti-federal amendments which would change the fundamental federal structure of the Basic Law.³ The safe-guards

¹Zurcher, *op. cit.*, p. 197.

²Plischke, *op. cit.*, pp. 35-36.

³Finer, *op. cit.*, p. 466.

to federalism in the amending process of the Basic Law are twofold: (1) laws which would seek to amend the Basic Law must be approved by both chambers of the federal Parliament by an extraordinary majority, thereby protecting the interests of the Laender through the participation of the Bundesrat; and (2) certain legislative proposals which would "undermine" the federal structure and division of power within that structure by amendment are prohibited.¹

II. FEDERALISM IN OTHER AREAS OF LIFE

To many persons "cultural affairs" denote opera houses, theatres, museums, libraries, etc. Most of these institutions are property of the Laender or local governments in West Germany. Traditionally, the support of these cultural institutions has been an important part of Land and local self-government. To a West German, however, "cultural affairs" also include such things as education, mass communications media, and religion. These three categories, as most other aspects of cultural life, are the private concerns of the Laender and are, therefore, of importance in this discussion of federalism.

The Laender have control of "cultural affairs" because they are not mentioned in the list of exclusive or concurrent Bund powers. Only in protecting cultural treasures from being removed abroad (Article 74-5),

¹Plischke, *op. cit.*, p. 36.

and the promotion of scientific research (Article 74-3) does the Basic Law specifically give the Bund legislative powers in the area of "cultural affairs." The Bund has often threatened to expand in this field, thereby causing heated disputes with the Laender. Generally this area of Land jurisdiction has been successfully defended, however, from serious Bund interference. Today the primary responsibilities of the Laender in the field of "cultural affairs" is generally accepted.¹

Control of the mass media (the press, radio and television).

The strict control of the press by the Nazi regime has caused a strong reaction in the opposite direction in the Bundesrepublik. Since 1945, decentralization of control of the press has been stressed. Article 5 in the "Basic Rights" section of the Basic Law states that there shall be "freedom of the press," and "no censorship."

Governmental regulation of the press is largely in the hands of the Laender, although Article 75-2 of the Basic Law does allow the Bund to enact "general rules of law" concerning the press. This right has not been implemented as yet. Several times the federal Cabinet has attempted to enter the field of press regulation, but it has been unsuccessful. In 1952, a press regulation bill was drafted but was never submitted to Parliament. In 1953-54 and 1957 further unsuccessful attempts were made to

¹Wells, op. cit., pp. 84-84.

establish central control over the press relations of federal agencies.

The Laender originally gained control of press regulation from the occupation powers early in the occupation. At first the German press was operated under licenses granted by the military government. In 1948, a directive was issued in the American zone to turn over such control to the Laender as soon as laws protecting the freedom of the press were inaugurated by the Laender. It took a year for these laws to be drafted in a form acceptable to the Americans. In the French and British zones there were fewer stipulations about control of the press; and, in many cases, a revised version of the 1934 Reich Press Law which was based on an 1874 statute was adopted. In 1958, the Federal Constitutional Court held that the portions of this law which were adopted and are still in effect today are not Bund but Land law. Thus a federalistic diversity has replaced traditional central control of press regulation. This, of course, has disadvantages, especially since the press laws are not uniform throughout the Bundesrepublik with those in some Laender being highly inferior to those in others.¹

In Germany there has been a continuing controversy over whether broadcasting should be centrally or Land-controlled, since 1923 when radio broadcasting first became widespread. Early centralized Reich

¹Ibid., pp. 86-88.

control gave way to a compromise which allowed Land participation in the mid-twenties. This compromise allowed the Laender supervisory control over eight regional radio stations, while the central government retained its authority over financial and technical matters. During the last years of the Weimar regime and under the Nazi regime the central government again assumed complete control of broadcasting. Under the occupation broadcasting was naturally controlled by the individual zone commanders. In 1948 the radio networks in the three zones of Western Germany were returned to German control.

The broadcasting issue flared up again when the Parliamentary Council delegates began to draft the Basic Law. Partial agreement was reached and written into Article 5, which provides for freedom of radio reporting and the prohibition of broadcasting censorship. Agreement as to how much power the Bund should be given over the broadcasting industry was not so easily obtained. In the first draft, as a reaction to the Nazi regime, central operation was excluded from the Basic Law. Further discussion brought changes, none of which were incorporated in the Basic Law. The Bund was allowed to assume supervisory control of the technical aspects of broadcasting, while the Laender were to have supervisory control over the cultural aspects of broadcasting. Future controversy was insured by allowing the question of jurisdiction over organizational matters to remain unresolved.

Today the administration of the broadcasting stations has taken on political implications in the Laender. Generally the stations are supervised by a large "broadcasting council" selected from various groups within the Land. By practice the political parties, through the Land parliaments, help select the council members and exert their influence in the filling of important positions in the broadcasting stations. At the present there are nine broadcasting stations in the Bundesrepublik which have banded together in a loose network. The radio stations of the network produce most of their own programs, while most television programs are cooperative ventures because of their cost.

The Bund was not satisfied with the minor role to which it was relegated in the broadcasting field. It preferred the establishment of a dual Bund-Land system. Under this dual system it was envisaged that the Bund would supervise stations sending programs overseas and to East Germany, and the Laender would retain control of their existing stations. A supervisory council composed of both Land and Bund officials would regulate the entire program. Also a national television network, in addition to that of the Laender owned network, was proposed. Supporters of this program felt that some central control would provide a better variety of programs, stop unnecessary duplication, and make the broadcasting stations less dependent on the political whims of the Laender. When the Bund began to take the necessary action to implement this program,

the Bundestag, the Bundesrat, the national political parties, the Laender governments and finally the Federal Constitutional Court all became involved in the ensuing dispute.¹

In 1953, a bill was introduced which incorporated some of these Government proposals. The bill was not acted on before the Bundestag adjourned; and because of the vigorous protests which then arose, it was not revived. Between 1953-57 a joint Bund-Land commission attempted to reach a compromise on the issue, but no satisfactory results were achieved. In 1958, the Bund again took action and introduced a bill similar to the one which it introduced in 1953. It provided for the establishment of short-wave and long-wave broadcasting stations and a second commercial and privately run television network. A supreme broadcasting association would be formed as a co-ordinating body, and supervisory councils composed of Bund, Land, and private representatives would be established to maintain the independence of the various broadcasting units.

This bill was not acceptable to the Laender governments, and thus the members of the Bundesrat from all political parties joined in condemning the bill which had received fair support in the Bundestag. The CDU was able to get the bill through the Bundestag in 1960 by excluding the television provision from it. The revised bill was then returned to the

¹Gerard Braunthal, "Federalism in Germany: The Broadcasting Controversy," The Journal of Politics, XXIV (August, 1962), pp. 548-52.

Bundesrat where the united front had broken, and the CDU was able to get the bill through this organ after it had been submitted to the Joint Media-tion Committee. This was not much of a victory for the Bund, however, as the revised bill did not have many antifederal implications, the second television network was no closer, and international broadcasts were not of too much concern to the Laender.

Meanwhile the Bund had continued with plans to provide a second commercial network. When the television provisions of the 1958 bill were stricken from that bill by the federal Parliament, Adenauer established a "privately incorporated German Television Authority" on his own in 1960. This authority was to have power to license private organizations to produce television programs. If this "unilateral administrative edict" had been allowed to stand, it would have represented a "juridicial coup" for Adenauer and his Government. Before the announcement of the authority was made public, however, all the Minister-Presidents from both parties met officially and offered a counter-proposal to the Government. The Bund un-wisely rejected this bid for compromise and negotiations collapsed. The issue was then taken to the Federal Constitutional Court by the Laender and an "interim injunction" was issued which halted the creation of the authority.

In its final decision on the matter, the Constitutional Court ruled against the Bund, thereby upholding the federal principle in one of the few areas where the Laender still have exclusive power. The Court

felt that the Bund had "violated" Article 30 (which puts under Land control any governmental powers not given to the Bund) and had "exceeded" Article 73 (which places only the technical aspects of broadcasting under Bund control). The Court thus ruled that the Laender have the right to control broadcasting because of their constitutional right to control cultural affairs (Articles 30, 70, 83). The Court also chastised the Bund for acting in the manner which it did, admonishing it to try and maintain a cooperative spirit with the Laender.

This decision "marked a milestone" in the history of German federalism. It also brought an end to the Bund's attempt to organize a competitive broadcasting program. The next step was up to the Laender, and they proceeded in 1961 to create a second independent public authority which has operated a second nationwide non-commercial broadcasting program since 1962.¹ The existence of the Laender as functional units of the West German federal system was again secure because of the broadcasting issue. This is not to say, however, that some extensive changes in the Land administration of the West German broadcasting system will not occur. There is still much dissatisfaction with the existing system. Especially important is the financial situation of the radio and television stations of the various Laender. The stations today receive funds through a tax collected by the Post Office for each television and radio set. In

¹Ibid., pp. 552-59.

areas where there are many viewers and listeners there is no problem, but in areas of limited reception (such as Bremen) there are not enough "paying customers." At one time there was an equalization of revenues between the rich and poor broadcasting corporations, but this no longer exists. It appears that although the matter of administration of the broadcasting system by the Laender is permanent for the present time, some changes may have to be made in the future.¹

Control of education. Under the Nazi regime a political educational system had been established. During the course of World War II this "distorted instrument of education" disintegrated and left an "educational vacuum." The occupation powers tried to fill this vacuum as quickly as possible after they gained control. They had even stated an education policy in the 1945 Potsdam Agreement, but this dealt mainly with the wiping out of Nazi and militaristic ideas. What remained of the former educational system was in chaos. There were few satisfactory teachers, the physical plants were destroyed, and the thousands of refugees from the East made these problems even more acute. The occupation powers were able to open some schools at the primary level in the summer of 1945, each according to their own ideas.

In the Western zones the occupation powers wanted the Germans to participate in the reform and development of the new German educational

¹Wells, op. cit., pp. 91-92.

system. The Germans resisted most reforms, however, and retained their traditional system. The tradition of allowing Lutheran and Catholic churches to take part in the system was also reinstated.¹ Private schools were also given a constitutional guarantee, but few were reopened. When the three occupation powers turned the administration of the educational system over to the Germans, the Land system of administration begun under the occupiers was continued. This system has been much criticized because of its lack of uniformity throughout the Bundesrepublik. The control of education by the individual Laender is strongly rooted in historical German tradition.

The Basic Law says little of Bund activities in education. The Basic Rights section of the Basic Law merely mentioned education in public schools briefly. Most important of the provisions in this section is Article 7 (in reference to Article 14) which gives the Laender the right to control their individual educational systems. The Bund has not tried to invade this area, and it becomes involved in education only in "peripheral" ways. One of the main instances is its distribution of revenue to the Laender, which may use part of these funds for educational purposes.

Even with only ten Laender, the German educational system is not very uniform due to the lack of overriding authority. This wide

¹Arthur Henry Moehlman (ed.), Comparative Education (New York: Holt, Rinehart and Winston, Inc., 1951), pp. 315-19.

diversification is caused by the fact that education is one of the most controversial and costly areas considered by the Land parliaments. Education concerns constituents in the Laender directly as taxpayers and as parents. Therefore, the legislators must pay close attention to the wishes of the citizens of their particular Land. Interstate educational agreements may be made, but they are easily breached if opposed at home.

Several interstate educational associations do exist in the Bundesrepublik. The most important of these is the Permanent Conference of Ministers of Education (Staendige Konferenz der Kultusminister der Bundesrepublik) which was established in 1948. It has three full-time committees attached to it. They are concerned with: (1) institutions of higher learning; (2) elementary, secondary, and vocational schools; (3) cultural matters such as fine arts, museums, libraries, etc. By 1958 this Conference of Ministers had created and adopted more than eighty agreements which attempted to create greater uniformity among the Laender educational systems. Among these agreements, the Duesseldorf Agreement of 1955 is most important. It standardized several elements in the educational systems of the Laender, thereby aiding persons moving from one Land to another. Most of the Land governments adopted this agreement after it was approved by the Conference of Minister-Presidents.

Because education is purely a function of the individual Laender, the various Laender have passed a good deal of legislation in this field.

The educational laws have not gained a permanent status, however, and still remain in a state of flux causing considerable conflict in the Land parliaments. While the Permanent Conference of Ministers of Education has created uniformity in some instances, the areas of administrative organization, appointment of teachers, and finance are very diversified throughout the Bundesrepublik as a whole.

The previously mentioned Konkordat Case is the most important event to occur in the field of education since the Bundesrepublik was established. Both education and religion come under the heading of cultural affairs, and therefore, the issue in this case involving church-state relations and education was very important to the independence of the Laender in the federal system.

Prior to 1933, several Laender had concordats with the Vatican and treaties with the Evangelical Church. Since 1945 these agreements have been recognized as still remaining in effect in some of the Land constitutions. New agreements have also been made by some Laender. The Federal Constitutional Court decision rendered in 1957 came as a result of an issue raised by one of these concordats with the Vatican in 1933. The Land government of Niedersachsen had sought in 1954 to adopt a law which would establish religious instruction for both Evangelical and Catholic children in the public schools. The federal Cabinet challenged this law because it was contrary to the concordat made in 1933. The

Federal Constitutional Court ruled that "while the Bund was the legal successor of the Reich with respect to treaty obligations, nevertheless, under the Basic Law education is completely reserved to the Laender." Hence the Laender are not legally bound to observe the school provisions of a treaty made by the Bund. A Bund threat to the cultural autonomy of the Laender was warded off, and their integrity was again upheld.¹

Control of the police. The Laender are able to assume exclusive control of the police power within their boundaries because, again, no mention of it is made in the list of concurrent powers in Article 74 of the Basic Law.² The issue of who should control the police system is made clearer by Article 73-10 of the Basic Law. It was adopted as a compromise, but it also serves to define the Bund's role in this field.³ This article states that the Bund and the Laender shall "cooperate" in matters concerning the criminal police. Although the control of the police power by the individual Land is not specifically mentioned in the Basic Law, their assumed control of this power is an important bulwark for federalism.

In spite of the Bund encroachment in several areas, the ordinary police power in the Bundesrepublik is still chiefly under the control of the

¹Wells, *op. cit.*, pp. 94-98, 101-2, 109.

²*Ibid.*, p. 53.

³Golay, *op. cit.*, p. 62.

individual Laender. The Land police system is directed by the Land Minister of the Interior, who usually delegates administrative authority to local authorities. Although the American and British occupation powers tried to "decentralize and municipalize" the Laender police systems, this pressure was largely disregarded in favor of more traditional patterns. Since the establishment of the Bundesrepublik, much important Land police legislation has been adopted. Some important interstate agreements have also been reached in this field.¹

III. THE STATUS OF GERMAN FEDERALISM TODAY AND IN THE FUTURE

In creating the structure of the Bundesrepublik there was a deliberate return to the federal principle. This was the will not only of the occupying powers but also that of the majority of the German people. The opponents of the federal structure in West Germany contend that this structure, as it has been depicted in this analysis, overly complicates the administrative and legislative tasks of the West German government. Thus, it is alleged to be uneconomical and inefficient. This is not a wholly invalid criticism, though a centralized structure would probably be even more unacceptable. The individual Laender might be neglected or oppressed by the central government, and the German people, who have a long particularist

¹Wells, *op. cit.*, pp. 68, 73-75.

tradition ingrained in their culture, might find it hard to adapt to such a system, especially after the resurgence of the particularist tendencies allowed under the Bundesrepublik.

The present federal structure would seem to have proven itself as evidenced by the high degree of economic and political progress which has been made since 1949 in the Bundesrepublik. Proof of its success is even more striking when compared to the results of the unitary system in Eastern Germany.¹ Of course, there is no way to measure accurately how much of the West German "miracle" of recovery is attributable to federalism. The economic planning of former Minister of Economics, Dr. Ludwig Erhard, and the "indefatigable persistence" of the West German worker and manager have played a big part in this phenomenal success. But here again federalism was active in creating a favorable and unoppressive atmosphere in which such initiative could be displayed at its maximum strength.² If one considers federalism to be a major force behind the political and economic accomplishments which have occurred in postwar Western Germany, then the federal structure of the Bundesrepublik has proven itself to be "an efficient devise of constitutionalism;" i.e., a functional check against the centralist ambitions of the Bund. In Germany this federal check would

¹German Federal Republic, Press and Information Office, Germany Reports (Weisbaden, 1953), pp. 51, 53.

²Morley, op. cit., pp. 211-12.

seem especially important because of past experience with the dilution of federal constitutions by the central government.¹

As pictured in earlier chapters, federalism is neither a simple, nor an unsophisticated political form. Nor does it follow the same pattern in all cases. For throughout the world, federalism has taken many different and unique forms, the West German case being no exception. Americans seem to feel that their form of federalism is the purest, and that hence the best federal system exists in the United States. The Swiss have a somewhat similar conception of their type of federalism. But one form of federalism is not necessarily better than any other, for "successful federalism shows variations." West German federalism is quite different in many respects from either the American or Swiss types, but that is not to say that it is inferior. As previously mentioned, its success as a functional system of government, and the mere fact that it has existed since 1949 without major change, proves that West German federalism is a viable political form.

Professor Wells believes that the success of West German federalism can be explained by three reasons: (1) The Bundesrepublik was built upon the firm base of existing traditional German federalism, which has been greatly aided by the equalization of the Laender in area, population, and resources; (2) well created Land governmental structures

¹Wells, op. cit., p. 111.

were first created (1945-49) and began to function before a federal structure was imposed upon them at the national level; and (3) the balance of power between the Bund and the Laender is effectively maintained by such federal organs as the Bundesrat and the Federal Constitutional Court.¹

For practical reasons one can place particular emphasis on Professor Wells' third point. The Bundesrat, supposedly the cornerstone of federalism in the Bundesrepublik, can protect "government integrity" and the interests of the Laender if it chooses to act.² Perhaps even more important from the viewpoint of decisive action is the unexpected role which the Federal Constitutional Court has assumed as the guardian of German federalism.

Since 1949, the Bund has increasingly attempted to usurp the powers of the Laender. With the help of the Bundesrat and the Federal Constitutional Court there has of late been a "rejuvenation" of the Laender which has put the Bund on the defensive. The Bund has been told bluntly to keep out of the cultural affairs field which belongs exclusively to the Laender. The financial position of the Laender has improved to such an extent that they can afford to be blunt with the Bund. In fact, the Laender are even considering the establishment of aid programs for the underdeveloped countries, which is a field of Bund priority. To become a more

¹Ibid., pp. 111-12.

²Pinney, op. cit., p. 173.

significant force in West German political life, the Laender are making renewed attempts at creating a solid front through coordination of policies achieved at frequent interstate conferences and through the exchange of information.

The political spokesman for the Laender defend this spirit of rejuvenation of the federal principle with historical and doctrinal arguments. To them, federalism is a "corps intermediaire which exists between the state and the citizen, a means to counteract the mass state and the mass man, and the democratic alternative to conformity and dictatorship."¹ Furthermore, it offers the opposition parties an opportunity to play responsible political roles at the Land level. Finally, it may represent the answer for a united Germany.

There are naturally still some West Germans who feel that a federal form of government is not the best type of government for Germany. They favor a strong central government and offer the democratic unitary system employed in Great Britain as a unitary alternative to German federalism. They consider the independent attitude of the Laender to be archaic and "anachronistic" in a postwar Europe of supra-national organizations. Justifiably, they state that the present-day economic, social, and defense establishments are too complex for the Laender to cope with. The Laender themselves will not deny this, and they realize the necessity

¹Braunthal, op. cit., p. 559.

of co-ordinating the few powers which they still retain. Nor can they deny that they are in the midst of a centralizing trend with national party politics submerging Land political issues. This is a necessity if West Germans are to accept "the political realities of life" in the Bundesrepublik today.¹

But perhaps this centralizing trend is merely a natural consequence of a larger political evolution. For, as some political scientists believe, federalism may merely be a "political way station on the road to the strongly integrated nation-state." These political scientists argue that the division of sovereignty (the basis of federalism) is valuable only when a nation is first getting on its feet and is to be abandoned for more appropriate unitary forms when the status of a great power has been reached. And is not the achievement of power status the political goal of every ambitious nation?² Only the future can answer this question fully, but it can be said that West Germany is well on the way to regaining a portion of the power status that Germany once held.

To predict the future of federalism in the Bundesrepublik is, therefore, quite hazardous. The unitary trend started by the Bund has gained momentum and still appears to be a potent force. It is doubtful whether the Laender, even with the aid of the Bundesrat and the Federal Constitutional Court, can halt this trend. Because of recent favorable

¹*Ibid.*, *op. cit.*, p. 559-60.

²Pinney, *op. cit.*, p. 173.

Constitutional Court decisions, the unitary trend has been slowed for the present time. This struggle would seem futile, however, because the unitary trend is not limited to West Germany nor even federal states alone, but is occurring throughout the world in both federal and unitary states alike.¹

There is one important factor which may tend to prolong the life of federalism in the Bundesrepublik and Germany as a whole for some time to come--i.e., the possibility of a reunited Germany. In 1948 when the creation of the Basic Law was first considered, the West German politicians intended that this document would be only a brief interim law which would suffice until Germany could again be united. Unification has still not been achieved, and the Basic Law has assumed a more permanent nature. Today one of the most urgent, but seemingly unsolvable, problems for Western Germany still remains this one of a divided Germany. Worse than mere division is the fact that the two governments are hostile entities under pressure from hostile international camps.

The Germans on both sides find this situation somewhat uncomprehensible. No German politician can hope to gain office, or retain this office, unless he at least "pays frequent lip service" to the goal of reunification. Most Germans realize, however, that attaining this goal is beyond their control since it is an issue of the Cold War. An impasse thus exists in which neither side seems likely to give in, for the stakes are too high.

¹Braunthal, op. cit., p. 561.

It appears that the division of Germany will continue for some time into the future. No one can venture to guess how long.

Germany itself is also involved directly in the Cold War struggle. It cannot afford neutralism, and furthermore gives little indication of desiring it, although this had been suggested as a solution to the problem of division.¹ If Germany could break away from outside pressure and become a strong and independent state, it could again play an important role as the "Land der Mitte." Conceivably, Germany might also assume a position similar to this as a member of a third force, e.g., a Franco-German led supra-national European unit. But the realities of today will not allow German neutralization or complete leadership of a third force. The Bundesrepublik has become too important as a pawn and partner in the Western Alliance for these possibilities to occur. From the Russian and American viewpoints, the only final solution possible would be a united Germany on their side.² Since this is very unlikely, division will continue.

Although the possibility of reunification seems remote, if it were to be attained, it would seem that a federal structure would be the only practical system which could be applied to the new German state, at least from the Western viewpoint. Furthermore, what better model could be found than the federal structure of the Bundesrepublik which is a proven

¹Dill, op. cit., pp. 452, 456.

²Cole, op. cit., pp. 438-39, 441.

and tested system. Besides, the Bundesrepublik was established, as the Preamble of the Basic Law states, "on behalf of those Germans to whom participation was denied" (the East Germans). This statement provides a legal basis on which the application of the present federal system in a reunited German state could rest. A reunited German state thus depicts a possibly bright future for German federalism. That is not to say, however, that a federal system adopted in a united German state would be eternal. For as soon as it was adopted it might be caught in the unitary movement which seems to be sweeping the world today.

CHAPTER IV

SUMMARY

Viewing the record of the Bundesrepublik over the last fifteen years, one can state that a new functional federal system of government has been created. The success of this federal system is based to a great extent on a viable constitutional document--the Basic Law. This Basic Law has proven to be very stable, and only two major sets of amendments have been added to it (one dealing with Bund-Land fiscal relations, and the other making rearmament possible). The delegates to the Parliamentary Council of 1948-49 can be truly proud of the document which they adopted in 1949, for it has allowed the Bundesrepublik to rise from a state of almost total destruction to the status of one of the most potent economic and military powers of Western Europe.

Although the efficiency of the West German political system is the envy of her neighbors, perfection in this area has not been achieved by any means. There are still those who would make further constitutional changes, because they feel that the Basic Law is too tentative in some of its provisions. But the fact remains that the Basic Law is almost unanimously accepted by the West German people, as are the policies produced under it. Moreover, the average West German citizen has more political responsibility than ever before under this Basic Law. He can indirectly participate in important political decisions by choosing from meaningful

alternatives in Bund and Land elections and through membership in political organizations. In comparing the Bundesrepublik with its two federal predecessors, one can justifiably state that it is the more perfect federal union. In fact, the Basic Law on which the Bundesrepublik is based is a truer constitution than any of its predecessors, and is likely to continue as a functional document when, and if, Germany is reunited.¹

Unlike its predecessors, the Basic Law firmly establishes the principles of federalism. The main purpose of the Basic Law is to protect the individual citizen and the Laender through a democratic federal government.² Although they were influenced by the occupation powers, the members of the Parliamentary Council maintained German political traditions causing the federal structure to be mainly a German work. It is perhaps fortunate that this is so, for the occupation powers based their demands for a federal structure for the new government on highly debatable premises. They assumed: (1) that some federal systems are better than others; and (2) that federalism can be made to serve such purposes as the promotion of democracy and security. Merely because federalism is successful in one state does not insure that it will be successful in another. In any case, the pressure applied on the West Germans to adopt specific

¹ Spiro, *op. cit.*, pp. 87, 425-26.

² Gottfried Dietze, "The Federal Republic of Germany: An Evaluation After Ten Years," *The Journal of Politics*, XXII (January, 1960) p. 123.

forms which they felt were impractical was almost an assurance that they would not be adopted.¹

In summary, fundamental federalism is to be found in the following provisions of the Basic Law: (1) the division of legislative power between the Bund and the Laender (Articles 70-82); (2) the division of fiscal authority between the Bund and the Laender (Articles 105-115, 120); (3) Laender participation in the adoption of the Basic Law and its amendment (Article 144); (4) the provision for a Federal Constitutional Court (Articles 92-95); (5) the participation of the Laender in the election of the federal President and the procedure by which he is replaced (Article 61); (6) the provision for the Bundesrat as a representative organ of the Laender; (7) the employment of civil servants at the Bund level based on a federalistic formula (Article 36); and (8) the execution of Bund laws by the Laender as "matters of their own concern" (Articles 50-53).

These eight federal features may be contrasted to only three main antifederal ones. They are: (1) the determination of the fundamental features of the Land constitutions by the Basic Law (Article 28); (2) the invasion of Land jurisdiction by the Bund in the areas of local self-government (Article 28); and (3) the Bund's power to change the geographical boundaries of the Laender (Article 29).²

¹Golay, *op. cit.*, pp. 108-9.

²Zurcher (ed.), *op. cit.*, pp. 139, 141-42, 149, 923.

These are the obvious federal and antifederal features to be found in the governmental system of the Bundesrepublik, but they do not present the true picture of federalism as it is found in practice in the Bundesrepublik today. As stated previously, the future of federalism in Western Germany does not appear to be particularly bright. Socio-economic factors have come to override political ones in the world in general as well as in the Bundesrepublik. Federalism everywhere has suffered as a result.¹ This does not mean, however, that federalism will be extinguished in the West German governmental structure or in the governmental systems of the rest of the world, but merely that the tendency today is to dilute the theoretically pure forms of federalism that exist or which have existed.

This analysis has attempted to define federalism as it was established in the Bundesrepublik and to picture its development through the first 15 years of this nation's existence. It is useful to study this particular governmental system because it embodies old political traditions and principles in an entirely new nation with striking and novel results. Certainly the role which the Bundesrepublik, and perhaps a future reunited Germany, will play in world affairs will be of increasing importance. For this reason alone, it is necessary to comprehend fully the nature of the state itself, so that its actions can be better understood.

¹Ibid., pp. 211-12.

In conclusion, the words of the English political scientist and legalist Lord Bryce perhaps best sum up the purpose back of this study:

Every creation of a new scheme of government is a precious addition to the political resources of mankind. It respects a survey and scrutiny of the constitutional experience of the past. It embodies an experiment full of information for the future.¹

¹Strong, op. cit., p. 1.

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